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Aguilar v. Coonrod Clerk's Record v. 2 Dckt. 36980

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(VOLUME 2)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

LAW CLERK

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of
Maria A. Aguilar, deceased, and as the
natural father and guardian of
GUADALUPE MARIA AGUILAR,
[REDACTED] **AGUILAR**, and [REDACTED]
AGUILAR, minors and **JOSE AGUILAR**,
JR., heirs of **Maria A. Aguilar**, deceased,

Plaintiffs-Respondents,

-vs-

NATHAN COONROD and **PRIMARY**
HEALTH CARE CENTER, an Idaho
corporation, **JOHN** and **JANE DOES I**
through **X**, employees of one or more of
the Defendants,

Defendants-Appellants.

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable **GREGORY M. CULET**, District Judge

Steven K. Tolman
TOLMAN & BRIZEE, P.C. and
Steven J. Hippler
GIVENS PURSLEY, LLP.

Attorneys for Appellants

David E. Comstock
and
Byron V. Foster

Attorneys for Respondents



36980

IN THE SUPREME COURT OF THE
STATE OF IDAHO

JOSE AGUILAR, individually, as the)
Personal Representative of the Estate of)
Maria A. Aguilar, deceased, and as the)
natural father and guardian of GUADALUPE)
MARIA AGUILAR, [REDACTED] AGUILAR,)
and [REDACTED] AGUILAR, minors and JOSE)
AGUILAR, JR., heirs of Maria A. Aguilar,)
deceased,)

Plaintiffs-Respondents,)

-vs-)

NATHAN COONROD and PRIMARY HEALTH)
CARE CENTER, an Idaho corporation, JOHN)
and JANE DOES I through X, employees of)
one or more of the Defendants,)

Defendants-Appellants.)

Supreme Court No. 36980

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

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| Notice of Service, filed 3-3-09 | 1458 – 1459 | 8 |
| Notice of Service, filed 4-25-07 | 397 – 399 | 2 |
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| Notice of Taking Deposition of Dean Lapinel, M.D., (Duces Tecum), filed 4-28-08 | 722 – 725 | 4 |
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| Stipulation for Dismissal of Defendant West Valley Medical Center with Prejudice, filed 5-24-07 | 400 – 405 | 3 |
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| West Valley Medical Center's Opposition to Plaintiffs' Motion for Leave to File Amended Complaint, filed 11-13-06 | 152 – 162 | 1 |

Other Claims

| Date | | Judge |
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| 6/2/2005 | New Case Filed-Other Claims | Gregory M Culet |
| | Summons Issued | Gregory M Culet |
| | Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Aguilar, Jose (plaintiff) Receipt number: 0117743 Dated: 6/2/2005 Amount: \$77.00 (Check) | Gregory M Culet |
| 10/11/2005 | Affidavit Of Service | Gregory M Culet |
| 10/12/2005 | Acceptance of Service (3) | Gregory M Culet |
| | Affidavit Of Service | Gregory M Culet |
| 10/13/2005 | Acceptance of Service | Gregory M Culet |
| 10/18/2005 | Acceptance of Service | Gregory M Culet |
| 10/26/2005 | Notice Of Appearance | Gregory M Culet |
| | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Lynch & Associates Receipt number: 0144389 Dated: 10/26/2005 Amount: \$52.00 (Check) | Gregory M Culet |
| 2/28/2006 | Voluntary Notice of dismissal of defendant Catherin Atup-Leavitt M.D. | Gregory M Culet |
| | Civil Disposition entered for: Atup-Leavitt, MD, Catherine, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. order date: 2/28/2006 | Gregory M Culet |
| 3/7/2006 | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Powers, Raymond D (attorney for Columbia West Valley Medical Center) Receipt number: 0168421 Dated: 3/7/2006 Amount: \$52.00 (Check) | Gregory M Culet |
| | Answer to complaint and demand for jury trial | Gregory M Culet |
| | Notice Of Service | Gregory M Culet |
| 5/8/2006 | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Dance, Gary T (attorney for Newman, Md, Steven R) Receipt number: 0180374 Dated: 5/8/2006 Amount: \$52.00 (Check) | Gregory M Culet |
| | Steven R Newman MD Answer to comp and demand for JT | Gregory M Culet |
| 5/23/2006 | Notice Of Service | Gregory M Culet |
| 7/10/2006 | Notice Of Service | Gregory M Culet |
| 8/24/2006 | Notice Of Service | Gregory M Culet |
| 9/18/2006 | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Chai, Andrew (defendant) Receipt number: 0204896 Dated: 9/18/2006 Amount: \$58.00 (Check) | Gregory M Culet |
| | Answer and demand for Jury Trial | Gregory M Culet |
| 9/21/2006 | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Lombardi, David R (attorney for Mercy Medical Center) Receipt number: 0205516 Dated: 9/21/2006 Amount: \$58.00 (Check) | Gregory M Culet |
| | Mercy Medical Center Answer to comp & demand for JT | Gregory M Culet |
| 9/27/2006 | Plt Motion for leave to Amend Comp to more specifically set forth allegations of agency and non-delegable duty against West Valley, Mercy Med, Primary Health Care | Gregory M Culet |
| | Affidavit of byron Foster in support of mo | Gregory M Culet |

Other Claims

| Date | | Judge |
|------------|--|-----------------|
| 9/27/2006 | Notice Of Hearing 10-26-06 9:00 | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 10/26/2006 09:00 AM) | Gregory M Culet |
| 9/29/2006 | Notice of Service Re: Discovery | Gregory M Culet |
| 10/6/2006 | Notice Of Taking Deposition Jose Aguilar | Gregory M Culet |
| | Notice Of Taking Deposition [REDACTED] Aguilar | Gregory M Culet |
| | Notice Of Taking Deposition [REDACTED] Aguilar | Gregory M Culet |
| | Notice Of Taking Deposition Guadalupe MARIA Aguilar | Gregory M Culet |
| | Notice Of Taking Deposition Jose Aguilar | Gregory M Culet |
| | Amended Notice Of Hearing 11-20-06 9:00 | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 11/20/2006 09:00 AM) | Gregory M Culet |
| 10/30/2006 | Notice Of Service | Gregory M Culet |
| 11/13/2006 | Mercy Medical Centers Response to Plt mo for leave to amend comp | Gregory M Culet |
| | West Valley Medical Centers oppose to Plt mo for leave to file amended comp (fax | Gregory M Culet |
| | Affidavit of Portia Jenkins in oppose to Plt mo for leave to file amended comp (fax | Gregory M Culet |
| | Affidavit of Kathy D Moore in oppose to Plt mo for leave to file amended comp (fax | Gregory M Culet |
| 11/16/2006 | Filing: I1B - Civil Answer Or Appear. More Than \$1000 With Prior Appearance Paid by: Lynch, James (attorney for Long, DO, Mitchell) Receipt number: 0214958 Dated: 11/16/2006 Amount: \$14.00 (Check) | Gregory M Culet |
| | Answer of def Mitchell Long to Plt comp and demand for JT | Gregory M Culet |
| 11/20/2006 | Plaintiffs' reply Memorandum in support of motion for leave to amend complaint | Gregory M Culet |
| | Affidavit of Byron Foster in support of plaintiffs' reply memorandum in support of motion for leave to amend complaint | Gregory M Culet |
| | Hearing result for Motion Hearing held on 11/20/2006 09:00 AM: Hearing Held | Gregory M Culet |
| 11/24/2006 | Notice of vacating depo of [REDACTED] Aguilar | Gregory M Culet |
| | Notice of telephonic hrg 12-6-06 9:00 | Gregory M Culet |
| | Hearing Scheduled (Conference - Telephone 12/06/2006 09:00 AM) | Gregory M Culet |
| 11/29/2006 | Answer to Plaintiffs' Complaint and Demand for Jury Trial | Gregory M Culet |
| | Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Hawley Troxell Ennis & Hawley Receipt number: 0216966 Dated: 11/29/2006 Amount: \$58.00 (Check) | Gregory M Culet |
| 11/30/2006 | Notice Of Service (fax) | Gregory M Culet |
| 12/6/2006 | Motion Held | Gregory M Culet |
| | Motion Granted | Gregory M Culet |
| | Notice Of Service of Discovery Documents (6) | Gregory M Culet |
| 12/8/2006 | Notice of Service Re: Discovery Documents (2) | Gregory M Culet |

Other Claims

| Date | | Judge |
|------------|--|-----------------|
| 12/13/2006 | Order Denying Motion to Amend Complaint as to West Valley Medical Center and Mercy Medical Center and Granting Motion to Amend Complaint as to Primary Health Care Center | Gregory M Culet |
| 12/18/2006 | Amended Complaint Filed & Demand for JT | Gregory M Culet |
| 12/26/2006 | Answer to amended comp & demand for JT | Gregory M Culet |
| 12/29/2006 | Answer to Plt amended comp & demand ofr JT | Gregory M Culet |
| 1/2/2007 | Def Steven R Newman Md Answer to amended comp & Demand for JT | Gregory M Culet |
| 1/8/2007 | Notice of compliance | Gregory M Culet |
| 1/10/2007 | Notice of compliance (2) | Gregory M Culet |
| 1/12/2007 | Notice Of Service | Gregory M Culet |
| 2/27/2007 | Notice of Service Re: Discovery | Gregory M Culet |
| 3/5/2007 | Request For Trial Setting | Gregory M Culet |
| 3/7/2007 | Def Andrew Chai MD Response To Request For Trial Setting | Gregory M Culet |
| | Def West Valley Response To Request For Trial Setting (fax) | Gregory M Culet |
| 3/8/2007 | Def Nathan Coonrod Md & Primary H Response To Request For Trial Setting (fax) | Gregory M Culet |
| 3/12/2007 | Defendant Steven R Newman, M.D.'s Response to Plaintiffs' Request for Trial Setting. | Gregory M Culet |
| 3/13/2007 | Def Mitchell Long Response To Request For Trial Setting | Gregory M Culet |
| 3/16/2007 | Stipulation for dismissal of defendant mercy medical center | Gregory M Culet |
| | Order Dismissing Defendant Mercy Medical center | Gregory M Culet |
| | Civil Disposition entered for: Mercy Medical Center, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. order date: 3/16/2007 | Gregory M Culet |
| 3/22/2007 | Notice Of Service | Gregory M Culet |
| 4/9/2007 | Notice of Service Re: Discovery | Gregory M Culet |
| 4/25/2007 | Notice Of Service | Gregory M Culet |
| 5/24/2007 | Stipulation for dismissal of defendant west valley medical center with prejudice | Gregory M Culet |
| 5/30/2007 | Order dismissing defendant West Valley Medical Center with prejudice | Gregory M Culet |
| | Civil Disposition entered for: Columbia West Valley Medical Center, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. order date: 5/30/2007 | Gregory M Culet |
| 6/20/2007 | Order Setting Case for trial and pretrial | Gregory M Culet |
| | Hearing Scheduled (Jury Trial 05/28/2008 09:00 AM) excluding 6-6,13,20 and 27, 2008 | Gregory M Culet |
| | Hearing Scheduled (Pre Trial 04/30/2008 08:30 AM) in chambers | Gregory M Culet |
| 7/6/2007 | Stipulation for scheduling and planning (fax) | Gregory M Culet |
| 12/10/2007 | Notice of Service Re: Discovery (5) | Gregory M Culet |
| 12/13/2007 | Affidavit Of Service (2) | Gregory M Culet |

Other Claims

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| 12/17/2007 | Stipulation to extend Plt Expert Disclosure deadline as to def Nathan Coonrod, MD | Gregory M Culet |
| | Order extending Plt expert disclosure deadline as to def Nathan Coonrod,MD | Gregory M Culet |
| 12/24/2007 | Stipulation to extend expert Disclosure Deadlines | Gregory M Culet |
| 12/31/2007 | Order extending expert disclosure deadlines | Gregory M Culet |
| 1/10/2008 | Notice Of Compliance | Gregory M Culet |
| 1/11/2008 | Notice Of Service | Gregory M Culet |
| | Notice Of Service | Gregory M Culet |
| 1/14/2008 | Notice Of Service | Gregory M Culet |
| 1/15/2008 | Plaintiffs Expert Witness Disclosure | Gregory M Culet |
| 1/24/2008 | Plt Supplemental expert witness Disclosure | Gregory M Culet |
| 2/11/2008 | Plaintiffs' Motion to Vacate and Reschedule Trial Setting (fax) | Gregory M Culet |
| 2/13/2008 | Motion shorten time (fax) | Gregory M Culet |
| 2/14/2008 | Notice Of Hearing 3-21-08 (fax) | Gregory M Culet |
| 2/15/2008 | Hearing Scheduled (Conference - Telephone 02/21/2008 11:00 AM) mo vacate | Gregory M Culet |
| | Order to shorten time RE: Plt mo to vacate & Reschedule trial setting | Gregory M Culet |
| | Amended Notice Of Hearing 2-21-08 11:00 | Gregory M Culet |
| | Notice Of Service | Gregory M Culet |
| 2/19/2008 | Def Mitchell Long DO,s Initial expert witness disclosure | Gregory M Culet |
| | Plt third suppl expert witness disclosure | Gregory M Culet |
| | Def Andrew Chai MD's expert witness disclosure | Gregory M Culet |
| 2/21/2008 | Hearing result for Jury Trial held on 05/28/2008 09:00 AM: Hearing Vacated excluding 6-6,13,20 and 27, 2008 | Gregory M Culet |
| | Hearing result for Pre Trial held on 04/30/2008 08:30 AM: Hearing Vacated in chambers | Gregory M Culet |
| | Hearing result for Conference - Telephone held on 02/21/2008 11:00 AM: Hearing Held mo vacate | Gregory M Culet |
| | Hearing result for Conference - Telephone held on 02/21/2008 11:00 AM: Motion Held mo vacate | Gregory M Culet |
| | Hearing result for Conference - Telephone held on 02/21/2008 11:00 AM: Motion Granted mo vacate | Gregory M Culet |
| | Hearing Scheduled (Jury Trial 04/27/2009 09:00 AM) 21 day setting | Gregory M Culet |
| 3/11/2008 | Amended Order Setting Case 4-27-08 & Pt 3-30-08 | Gregory M Culet |
| | Hearing Scheduled (Pre Trial 03/30/2009 08:30 AM) | Gregory M Culet |
| 3/17/2008 | Plt Fourth Suppl Expert Witness Disclosure | Gregory M Culet |
| 4/11/2008 | Notice Of Taking Deposition daniel brown | Gregory M Culet |
| 4/14/2008 | Plaintiffs' Fifth Supplemental Expert Witness Disclosure | Gregory M Culet |
| 4/22/2008 | Defendants Nathan Coonrod, M.D.'s and Primary Health Care Center's Expert Witness Disclosure (fax) | Gregory M Culet |
| 4/28/2008 | Notice Of Taking Deposition paul blaycock | Gregory M Culet |

Other Claims

| Date | | Judge |
|------------|---|-----------------|
| 4/28/2008 | Notice Of Taking Deposition dean lapinel | Gregory M Culet |
| 5/1/2008 | Notice Of Taking Deposition Duces Tecum of Thomas M. Donndelinger, M.D. | Gregory M Culet |
| 5/7/2008 | Notice Of Taking Deposition Richarf Lubman MD | Gregory M Culet |
| 5/16/2008 | Amended Notice Of Taking Deposition richard lubman | Gregory M Culet |
| 6/6/2008 | Plaintiff's Sixth Supplemental Expert Witness Disclosure | Gregory M Culet |
| 6/9/2008 | Notice of Service Re: Discovery (2) | Gregory M Culet |
| 6/13/2008 | Affidavit Of Service | Gregory M Culet |
| 6/19/2008 | Notice Substitution Of Counsel/for def Nathan Coorod MD & Primary Health | Gregory M Culet |
| 6/23/2008 | Notice Of Service of Discovery Documents | Gregory M Culet |
| 6/24/2008 | Motion for status conference | Gregory M Culet |
| 6/30/2008 | Plt Response to Motion for Status Conference | Gregory M Culet |
| 7/1/2008 | Notice of hearing for Status Conference 7-15-08 8:30 | Gregory M Culet |
| | Hearing Scheduled (Conference - Status 07/15/2008 08:30 AM) | Gregory M Culet |
| 7/15/2008 | Hearing result for Conference - Status held on 07/15/2008 08:30 AM: District Court Hearing Held Court Reporter:Debora Kreidler Number of Transcript Pages for this hearing estimated:less than 100 pages | Gregory M Culet |
| | Hearing result for Conference - Status held on 07/15/2008 08:30 AM: Motion Held | Gregory M Culet |
| | Hearing result for Conference - Status held on 07/15/2008 08:30 AM: Motion Granted | Gregory M Culet |
| 7/21/2008 | Order Regarding motion for Status conference and PT Deadlines | Gregory M Culet |
| 7/24/2008 | Amended Stipulation for scheduling and Planning | Gregory M Culet |
| 8/1/2008 | Order Adopting Amended Stipulation for Scheduling & Planning | Gregory M Culet |
| 9/2/2008 | Plaintiffs' Seventh Supplemental Expert Witness Disclosure (fax) | Gregory M Culet |
| 9/11/2008 | Amended Notice Of Taking Deposition Dean Lapinel MD Duces tecum | Gregory M Culet |
| 10/15/2008 | Defendant Mitchell Long, D.O.'s second Expert Witness Disclosure | Gregory M Culet |
| 10/16/2008 | Notice Of Service (fax) | Gregory M Culet |
| | Notice Of Service for Defendant Steven R. Newman, M.D.'s Third Expert Witness Disclosures (fax) | Gregory M Culet |
| 10/17/2008 | Def Nathan Coonrod MD, Primary Health Care Supplemental Disclosure of Expert Witnesses | Gregory M Culet |
| 10/22/2008 | Defendant Andrew Chai, M.D.'s Supplemental Expert Witness Disclosure (fax) | Gregory M Culet |
| 11/17/2008 | Plaintiffs' rebuttal expert witness disclosure | Gregory M Culet |
| | Plaintiffs' eighth supplemental expert witness disclosure | Gregory M Culet |
| 1/30/2009 | Defendant Andrew Chai, M.D.'s Motion for Summary Judgment (fax) | Gregory M Culet |
| | Affidavit of Andrew U. Chai, M.D. in Support of Defendant Andrew U. Chai, M.D.'s Motion for Summary Judgment (fax) | Gregory M Culet |
| | Memorandum in Support of Defendant Andrew Chai, M.D.'s Motion for Summary Judgment (fax) | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 1/30/2009 | Notice Of Hearing 3-24-09 (fax) | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 03/24/2009 01:30 PM) summ judg | Gregory M Culet |
| 2/2/2009 | Notice Of Service of Discovery Documents | Gregory M Culet |
| 2/3/2009 | Notice Of Service | Gregory M Culet |
| | Notice Of Service | Gregory M Culet |
| 2/10/2009 | Defn Steven R Newman M.D.'s Motion in Limine | Gregory M Culet |
| | Defn Steven R Newman M.D.'s Memorandum in Suppt of Motn in Limine | Gregory M Culet |
| | Affidavit of Julian E Gabiola in Support of Defn Steven R Newman, M.D.'s Motn in Limine | Gregory M Culet |
| | Notice of Vacating Hearing (fax) | Gregory M Culet |
| | Hearing result for Motion Hearing held on 03/24/2009 01:30 PM: Hearing Vacated summ judg | Gregory M Culet |
| 2/13/2009 | Notice Of Service | Gregory M Culet |
| 2/18/2009 | Stipulation of Parties for Execution and Filing of the Attached Qualified Protective Order | Gregory M Culet |
| | Qualified Protective Order | Gregory M Culet |
| 2/19/2009 | Plntf's Motion for Protective Order | Gregory M Culet |
| | Memorandum in Support of Plntf's Motion for Protective Order | Gregory M Culet |
| | Affidavit of Bryon V Foster in Support of Plntf's Motion for Protective Order | Gregory M Culet |
| 2/20/2009 | Notice of Service Re: Discovery | Gregory M Culet |
| | Notice of Service Re: Discovery Document | Gregory M Culet |
| 2/23/2009 | Notice Of Hearing | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 04/23/2009 09:00 AM) Motion in Limine | Gregory M Culet |
| 2/25/2009 | Notice Of Hearing on Plts Motion for Protective Order | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 03/26/2009 09:00 AM) Motion for Protective Order (Plt) | Gregory M Culet |
| 2/26/2009 | Notice Of Service | Gregory M Culet |
| | Notice of Service Re: Discovery Documents | Gregory M Culet |
| 2/27/2009 | Defn Nathan Coonrod MD's Primary Health Care Center's Motion in Limine | Gregory M Culet |
| | Affidavit of Steven K Tolman in Suppt of Defn Nathan Coonrod MD's and Primary Health Care Center's Motn in Limine | Gregory M Culet |
| | Plnt's Frist Motion in Limine | Gregory M Culet |
| | Memorandum in Suppt of Plnt's First Motn in Limine | Gregory M Culet |
| | Notice Of Hearing on Plnt's Frist Motn in Limine 4-23-09 9:00 am | Gregory M Culet |
| 3/2/2009 | Notice Of Service | Gregory M Culet |
| | Defendant Steven R. Newman MD's Fourth Expert Witness Disclosure | Gregory M Culet |
| | Plt Motion to Strike | Gregory M Culet |
| | Plt Supplemental Rebuttal Expert Witness Disclosure | Gregory M Culet |
| | Notice of Service Re: Discovery Documents | Gregory M Culet |
| | Notice Of Hearing on Plt mo to Strike 3-26-09 9:00 | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 3/2/2009 | Notice Of Service (fax) | Gregory M Culet |
| | Notice Of Service (fax) | Gregory M Culet |
| 3/3/2009 | Notice Of Service | Gregory M Culet |
| 3/4/2009 | Substitution Of Counsel fo mitchell long (fax) | Gregory M Culet |
| | Def Andrew Chai MD Second Supplemental Expert Witness Disclosure | Gregory M Culet |
| | Notice of Service Re: Discovery Documents | Gregory M Culet |
| 3/5/2009 | Notice Of Hearing 04-23-09 at 9:00 am | Gregory M Culet |
| 3/6/2009 | Def Steven R Newman, MD's Second Motion in Limine | Gregory M Culet |
| | Def Steven R Newman MD's Memorandum in Support of Second Motion in Limine and in Opposition to Plntfs Motion for Protective Order | Gregory M Culet |
| | Def Steven R Newman MD Fifth Expert Witness Disclosure | Gregory M Culet |
| | Def Steven R Newman MD Pre-trial Statement | Gregory M Culet |
| 3/9/2009 | Notice of Service of Discovery Documents | Gregory M Culet |
| | Defendant Steven R Newman MD's Third Motion in Limine | Gregory M Culet |
| | Defendant Steven R Newman MD's Memorandum in Support of Third Motion in Limine | Gregory M Culet |
| | Affidavit of Julian E Gabiola in Support of Defendant Steven R Newman MD's Third Motion in Limine | Gregory M Culet |
| 3/10/2009 | Notice of Service Re: Discovery | Gregory M Culet |
| 3/13/2009 | Defendants Nathan Coonrod, MD's and Primary Health Care Center's Second Motion in Limine | Gregory M Culet |
| | Affidavit of Steven K. Tolman in Support of Defendants Nathan Coonrod, MD's and Primary Health Care Center's Second Motion in Limine | Gregory M Culet |
| | Notice Of Hearing 4-23-09 | Gregory M Culet |
| 3/16/2009 | Notice Of Hearing, 4/23 | Gregory M Culet |
| | Def Steven R Newman, MD's Memorandum in Opposition to Plntf's Motion to Strike Fourth Expert Witness Disclosure | Gregory M Culet |
| | Affidavit of Julian E Gabiola in Opposition to Plntf's Motion to Strike | Gregory M Culet |
| 3/18/2009 | Defn Mitchell Long, D.O.'s Joinder in Defns Nathan Coonrod, M.D.'s and Primary health Care Center's Motion in Limine | Gregory M Culet |
| | Defn Mitchell Long, D.O.'s Joinder in Defn Steven R Newman, M.D.'s Motion in Limine | Gregory M Culet |
| | Defn Mitchell Long, D.O.'s Joinder in Defn Steven R Newman, M.D.'s Thrid Motion in Limine | Gregory M Culet |
| | Defn Mitchell Long, D.O.'s Motion in Limine | Gregory M Culet |
| | Defn mitchell Long D.O.'s Memorandum in Support of Motn in Limine | Gregory M Culet |
| | Affidavit of Counsel in Suppt of Defendant Mitchell Long, D.O's Motion in Limine | Gregory M Culet |
| | Notice Of Hearing Re: Defn Mitchell Long, D.O's Motion in Limine | Gregory M Culet |
| | Dr. Long's Joinder in Defn Dr. Newman's Second Motion in Limine and Opposition to Plnt's Motn for Protective Order | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 3/18/2009 | Affidavit of Counsel in Suppt of Dr. Long's Joinder in Defn Dr. Newman's Second Motion in Limine and Opposition to Plnt's Motn for Protective Order | Gregory M Culet |
| 3/20/2009 | Joinder in Defns Nathan Coonrod, MD's and Primary Health Care Center's Motion in Limine and Second Motn in Limine, and Defn Steven R Newman, MD's Motn in Limine, Second Motn in Limine and Third Motn in Limine | Gregory M Culet |
| | Defn Andrew Chai, MD's Motion in Limine | Gregory M Culet |
| | Notice Of Hearing 4-23-09 9:00 am | Gregory M Culet |
| | Affidavit of Counsel in Suppt of Defn Andrew Chai, MD's Motn in Limine | Gregory M Culet |
| | Memorandum in Suppt of Defn Andrew Chai, MD's Motn in Limine | Gregory M Culet |
| 3/23/2009 | Defendant's nathan coonrod and primary heakth care center's Pre-trial Statement (fax) | Gregory M Culet |
| | Mitchell Long MD's Pre-trial Statement | Gregory M Culet |
| | Plnt's Witness List | Gregory M Culet |
| | Plnt's Exhibit List | Gregory M Culet |
| | Plnt's Pretrial/Trial Memorandum | Gregory M Culet |
| 3/24/2009 | Defendant andrew chai Pre-trial Statement (fax) | Gregory M Culet |
| 3/26/2009 | Hearing result for Motion Hearing held on 03/26/2009 09:00 AM: Motion Held PI Mtn for Protective Order | Gregory M Culet |
| | PI Mtn to Strike | |
| | District Court Hearing Held | Gregory M Culet |
| | Court Reporter: Laura Whiting | |
| | Number of Transcript Pages for this hearing estimated: more than 100 pages | |
| 3/27/2009 | Defendant Mitchell Long, D.O.'s Supplemental Expert Witness Disclosure | Gregory M Culet |
| 3/30/2009 | Hearing Scheduled (Motion Hearing 04/22/2009 03:00 PM) status conference | Gregory M Culet |
| | Hearing result for Motion Hearing held on 04/23/2009 09:00 AM: Hearing Vacated Motion in Limine / Frist Motn in Limine/second motn in limine | Gregory M Culet |
| | Hearing result for Pre Trial held on 03/30/2009 08:30 AM: Hearing Held | Gregory M Culet |
| | Hearing result for Pre Trial held on 03/30/2009 08:30 AM: District Court Hearing Held | Gregory M Culet |
| | Court Reporter: Debora Kreidler | |
| | Number of Transcript Pages for this hearing estimated: less than 100 pages | |
| 4/7/2009 | Notice Of Service of Discovery | Gregory M Culet |
| 4/8/2009 | Defendant Mitchell Long, D.O.'s Second Supplemental Expert Witness Disclosure | Gregory M Culet |
| | Defendant Steven R. Newman, M.D.'s Memorandum in Opposition to Plaintiffs' Motion in Limine | Gregory M Culet |
| 4/9/2009 | Plaintiffs' Ninth Supplemental Expert Witness Disclosure (fax) | Gregory M Culet |
| | Defendant steven newman's trial brief | Gregory M Culet |
| | defendant steven newman's proposed jury instructions | Gregory M Culet |
| | Special verdict form | Gregory M Culet |
| | Jury instructions | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 4/13/2009 | Defn Steven R Newman MD's Objection to Plnt's Ninth Supplemental Expert Witness Disclosure | Gregory M Culet |
| | Affidavit of C Clayton Gill in Suppt of Defn Steven R Newman MD's Objection to Plnt's Ninth Supplemental Expert Witness Disclosure | Gregory M Culet |
| | Affidavit of Kenneth J. Bramwell, M.D. | Gregory M Culet |
| | Affidavit of Byron V. Foster in Support of Plaintiff's Memorandum in Opposition to Andrew Chai, M.D.'s Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendant Andrew Chai, M.D.'s Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendants Nathan Coonrod's and Primary Health Care Center's Second Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendant Long's Joinder in Defendant Dr. Newman's Second Motion in Limine and Opposition to Plaintiff's Motion for Protective Order | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Nathan Coonrod, M.D.'s and Primary Health Center's Motion in Limine | Gregory M Culet |
| | Affidavit of Byron V. Foster in Opposition to Defendant Mitchell Long, D.O.'s Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendant Mitchell Long, D.O.'s Motion in Limine | Gregory M Culet |
| | Affidavit of Byron V. Foster in Opposition to Defendant Steven Newman, M.D.'s Third Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum Opposition to Defendant Steven Newman, M.D.'s Third Motion in Limine | Gregory M Culet |
| | Affidavit of Byron V. Foster in Opposition to Defendant Steven R. Newman, M.D.'s Second Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendant Steven R. Newman, M.D.'s Second Motion in Limine | Gregory M Culet |
| | Affidavit of Byron V. Foster in Opposition to Defendant Steven Newman, M.D.'s Motion in Limine | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendant Steven Newman, M.D.'s Motion in Limine | Gregory M Culet |
| | Plaintiff's Proposed Jury Instructions | Gregory M Culet |
| | Plaintiff's Motion to Shorten Time Re: Plaintiff's Motion for Protective Order | Gregory M Culet |
| | Plaintiff's Motion for Protective Order | Gregory M Culet |
| | Affidavit of Byron V. Foster in Support of Plaintiff's Motion for Protective Order | Gregory M Culet |
| 4/14/2009 | Defendant Andrew Chai, M.D.'s Requested Jury Instructions (fax) | Gregory M Culet |
| | def nathan coonrod and primary health care proposed jury instructions | Gregory M Culet |
| | jury instructions | Gregory M Culet |
| | jury instructions | Gregory M Culet |
| | Special verdict form | Gregory M Culet |
| | Defendant Steven R. Newman, M.D.'s Memorandum in Opposition to Plaintiffs' Motion for Protective Order Re: Dr. Bland (fax) | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 4/14/2009 | Order to Shorten time RE: Plt Motion for Protective Order | Gregory M Culet |
| 4/15/2009 | defendant andrew chai's joinder in defendant michale long's Motion in limine (fax) | Gregory M Culet |
| | defendant andrew chai's response to pltf's first motion in limine (fax) | Gregory M Culet |
| 4/16/2009 | defendants nathan coonrod and primary health care's Memorandum in opposition to pltf's motion in limine (fax) | Gregory M Culet |
| 4/17/2009 | Plaintiffs' Reply to Defendant Andrew Chai, M.D.'s Response to Plaintiffs' First Motion in Limine (fax) | Gregory M Culet |
| | Plaintiffs' Reply to Defendant Nathan Coonrod M.D. and Primary Health Care Center's Memorandum in Opposition to Plaintiffs' Motion in Limine (fax) | Gregory M Culet |
| | Plaintiffs' Reply to Defendant Steven R. Newman's Memorandum in Opposition to Plaintiffs' Motion in Limine (fax) | Gregory M Culet |
| | Affidavit of Byron V. Foster in Support of Plaintiffs' Reply to Defendant Steven R. Newman, M.D.'s Opposition to Plaintiffs' Motion in Limine (fax) | Gregory M Culet |
| 4/20/2009 | Defendant Steven R. Newman, MD's replay memorandum in support of first, second, and third motions in limine | Gregory M Culet |
| | Defendants Nathan Coonrod, M.D.'s and Primary Health Care Center's Joinder in Defendant Steven R. Newman, M.D.'s Memorandum in Opposition to Plaintiffs' Motion for Protective Order (fax) | Gregory M Culet |
| | Defendants Nathan Coonrod, MD's and Primary Health Care Center's Supplemental Proposed Jury Instruction and Amended Special Verdict Form (fax) | Gregory M Culet |
| | pltf's reply to def steven newman memorandum in opposition to pltf's motion for protective order (fax) | Gregory M Culet |
| | Defendants Nathan Coonrod, MD's and Primary Health Care Center's Second Supplemental Disclosure of Expert Witnesses (fax) | Gregory M Culet |
| 4/21/2009 | def's nathan coonrod and primary health care reply in support of motion in limine (fax) | Gregory M Culet |
| | def's nathan coonrod and primary health care reply in support of second motion in limine (fax) | Gregory M Culet |
| | Reply to pltf' memorandum in opposition to def motion in limine (fax) | Gregory M Culet |
| | Affidavit of counsel in reply to pltf's memorandum in opposition to def motion in limine (fax) | Gregory M Culet |
| | Plaintiffs' Amended Exhibit List (fax) | Gregory M Culet |
| | Order Granting Plt Motion for Protective Order RE: Kenneth Bramwell MD | Gregory M Culet |
| 4/22/2009 | Defendants Nathan Coonrod, M.D. and Primary Health Care Center's Trial Brief | Gregory M Culet |
| | Hearing result for Motion Hearing held on 04/22/2009 03:00 PM: Hearing Held motions in limine/status conference | Gregory M Culet |
| | Hearing result for Motion Hearing held on 04/22/2009 03:00 PM: District Court Hearing Held | Gregory M Culet |
| | Court Reporter: | |
| | Number of Transcript Pages for this hearing estimated: less than 500 | |
| 4/23/2009 | Plaintiffs' Objection to Defendant Nathan Coonrod, M.D. and Primary Health Care Center's Trial Brief (fax) | Gregory M Culet |

Other Claims

| Date | | Judge |
|-----------|--|-----------------|
| 4/23/2009 | Notice Of Taking Deposition of William Blahd, M.D. (Duces Tecum) (fax) | Gregory M Culet |
| | Plaintiffs' Second Amended Exhibit List (fax) | Gregory M Culet |
| 4/24/2009 | Affidavit Of Service | Gregory M Culet |
| | Defendant Steven R. Newman, M.D.'s Objection to Plaintiff's Third Amended Exhibit List (fax) | Gregory M Culet |
| | Joinder in Defendant Steven R. Newman M.D.'s Objection to Plaintiffs' Third Amended Exhibit List (fax) | Gregory M Culet |
| | Plaintiffs' Objection to Defendants Nathan Coonrod, M.D. and Primary Health Care Center's Reservation of Right to Challenge Qualifications of Plaintiffs' Experts Paul blaylock, M.D. and Dean Lapinel, M.D. (fax) | Gregory M Culet |
| 4/27/2009 | Defns Nathan Coonrod MD and Primary Health Care center's Supplemental Trial Brief | Gregory M Culet |
| | Plnt's Bench Brief Re: Defn's Undisclosed Expert Witness Testimony at Trial | Gregory M Culet |
| | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: Jury Trial Started 21 day setting | Gregory M Culet |
| | District Court Hearing Held Court Reporter: Debora Kreidler Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 4/28/2009 | Plaintiffs' Bench Brief Re: Character/Impeachment of Defendant Newman (fax) | Gregory M Culet |
| | District Court Hearing Held Court Reporter: Debora Kreidler Number of Transcript Pages for this hearing estimated: less than 500 | Gregory M Culet |
| 4/29/2009 | Plaintiff's response bench Brief Re: defenat coonrod's supplemental trial brief (fax) | Gregory M Culet |
| | Affidavit of Byron V Foster | Gregory M Culet |
| | District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 4/30/2009 | District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 5/4/2009 | Plnt's Bench Brief Re: Dr Lebaron and the Local Standard of Care | Gregory M Culet |
| | District Court Hearing Held Court Reporter: Debora Kreidler Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 5/5/2009 | District Court Hearing Held Court Reporter: Debora Kreidler Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 5/6/2009 | District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |
| 5/7/2009 | District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: over 100 | Gregory M Culet |

Other Claims

| Date | | Judge |
|-----------|---|-----------------|
| 5/8/2009 | Objection to Plaintiffs' Proposed Jury Instructions (fax) | Gregory M Culet |
| | Defendant Steven R. Newman, M.D.'s Objections to Plaintiffs' Proposed Jury Instructions (fax) | Gregory M Culet |
| 5/11/2009 | Plnt's Objection to the Defn's Proposed Jury Instructions | Gregory M Culet |
| | Plnt's Proposed Supplemental Jury Instructions | Gregory M Culet |
| | Plnt's Final Rebuttal Disclosure | Gregory M Culet |
| | District Court Hearing Held | Gregory M Culet |
| | Court Reporter: Debora Kreidler | |
| | Number of Transcript Pages for this hearing estimated: over 100 | |
| 5/12/2009 | District Court Hearing Held | Gregory M Culet |
| | Court Reporter: Debora Kreidler | |
| | Number of Transcript Pages for this hearing estimated: over 100 | |
| 5/13/2009 | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: Preliminary jury instructions | Gregory M Culet |
| | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: First juror question and answer | Gregory M Culet |
| | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: second juror question and answer | Gregory M Culet |
| | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: Special verdict form | Gregory M Culet |
| | District Court Hearing Held | Gregory M Culet |
| | Court Reporter: Laura Whiting | |
| | Number of Transcript Pages for this hearing estimated: less than 100 | |
| 5/14/2009 | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: Final jury instructions | Gregory M Culet |
| | Hearing result for Jury Trial held on 04/27/2009 09:00 AM: District Court Hearing Held | Gregory M Culet |
| | Court Reporter: | |
| | Number of Transcript Pages for this hearing estimated: over 500 | |
| 5/20/2009 | Civil Disposition entered for: Coonrod, MD, Nathan, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. Filing date: 5/20/2009 Jdmt upon Special Verdict \$4,200,000.00 | Gregory M Culet |
| | Judgment Re: Steven R Newman, MD (final Jdmt forthcoming) | Gregory M Culet |
| 5/28/2009 | Defn's Nathan Coonrod MD and Primary Health care Center's Motion for New Trial or in the Alternative Motn to Amend Jdmt for a Remittitur of Damages and Motn for Jdmt Notwithstanding the Verdict | Gregory M Culet |
| | Defn's Nathan Coonrod MD and Primary Health Care Center's Memorandum in Suppt of Their Motn for New Trial or in the Alternative Notn to Amend Jdmt for Remittitur of Damages and Motn for Jdmt Notwithstanding the Verdict | Gregory M Culet |
| | Affidavit in Suppt of Defendants Nathan Coonrod and Primary Health Care Center's Motn for New Trial or in the Alternative Motn to Amend Jdmt for a Remittitur of Damages and Motn for Jdmt Notwithstanding the Verdict | Gregory M Culet |
| | Defn's Nathan Coonrod MD and Primary Health care Center's Objection to the Jdmt upon the Verdict and Motn to Alter or Amend the Jdmt to Apply the Statutory cap on Non-Economic Damages to Plnt's Collectively | Gregory M Culet |

Other Claims

| Date | | Judge |
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| 5/28/2009 | Defn's Nathan Coonrod MD and Primary Health care Center's Memorandum in Cuppt of their Objection to the Jdmt upon the Verdict and Motn to Alter or Amend the Jdmt to Apply the Statutory Cap on Non-Economic Damages to all Plnt's Collectively | Gregory M Culet |
| | Notice Of Hearing 7-1-09 9:00 am | Gregory M Culet |
| | Hearing Scheduled (Motion Hearing 07/01/2009 09:00 AM) | Gregory M Culet |
| 5/29/2009 | Stipulation for Dismissal with Prej as to Def Andrew Chai MD | Gregory M Culet |
| 6/2/2009 | Civil Disposition entered for: Chai, Andrew, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. Filing date: 6/2/2009 Order of Dismissal with Prejudice as to Defendant Andrew Chai MD | Gregory M Culet |
| | Defn Steven R Newman MD's Memorandum of Costs and Affidavit of Julian E Gabiola in Suppt of Same (Filed Under Seal) | Gregory M Culet |
| | Document sealed | |
| 6/3/2009 | Plaintiff's Verified Memorandum of Costs | Gregory M Culet |
| | Memorandum in Support of Plaintiff's Request for Award of Discretionary Costs | Gregory M Culet |
| 6/12/2009 | Stipulation for Dismissal With Prejudic as to Defn Mitchell Long DO OLN Y | Gregory M Culet |
| 6/15/2009 | Order of Dismissal with Prej as to Def Mitchell Long DO only | Gregory M Culet |
| | Civil Disposition entered for: Long, DO, Mitchell, Defendant; Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff. Filing date: 6/15/2009 | Gregory M Culet |
| | Plaintiffs' Objections to Defendant Steven R. Newman, M.D.'s Memorandum of Costs and Affidavit of Julien E. Gabiola in Support of the Same (fax) | Gregory M Culet |
| 6/17/2009 | Def Nathan Coonrod MD & Primary Health Care Centers Memorandum in Oppose to Plt Memo of costs & Fees | Gregory M Culet |
| | Defendants Nathan Coonrod, M.D. and Primary Health Care Center's Motion to Disallow Costs (fax) | Gregory M Culet |
| 6/18/2009 | Affidavit of Byron V Foster | Gregory M Culet |
| | Notice Of Hearing 7-1-09 (fax) | Gregory M Culet |
| | Notice Of Hearing 7/1/2009 (fax) | Gregory M Culet |
| 6/22/2009 | Defendant Steven R. Newman, M.D.'s Response to Plaintiffs' Objection to Defendant Steven R. Newman, M.D.'s Memorandum of Costs | Gregory M Culet |
| | Second Affidavit of Julian E. Gabiola in Support of Defendant Steven R. Newman, M.D.'s Memorandum of Costs | Gregory M Culet |
| 6/24/2009 | Plaintiff's Memorandum in Opposition to Defendants Nathan Coonrod, M.D. and Primary Health Care Center's Motion for New Trial, or in the Alternative Motion to Amend Judgment for a Remittitur, and Motion for JNOV | Gregory M Culet |
| | Plaintiff's Memorandum in Opposition to Defendants Nathan Coonrod, M.D., and Primary Health Care Center's Memorandum in Support of their Objection to the Judgment Upon the Verdict and their Motion to Alter or Amend the Judgment to Apply the Statutory Cap on Non-Economic Damages to All Plaintiffs Collectively | Gregory M Culet |
| 6/26/2009 | Stipulation for Dismissal with Prejudice | Gregory M Culet |

Other Claims

| Date | | Judge |
|-----------|--|-----------------|
| 6/26/2009 | Civil Disposition entered for: Aguilar, [REDACTED] Plaintiff; Aguilar, Guadalupe, Plaintiff; Aguilar, Jose, Plaintiff; Aguilar, Jr, Jose, Plaintiff; Aguilar, [REDACTED] Plaintiff; Newman, Md, Steven R, Defendant. Filing Order of Dismissal with Prejudice (as to Steven R Newman MD) date: 6/26/2009 | Gregory M Culet |
| | Case Status Changed: closed pending clerk action | Gregory M Culet |
| 6/29/2009 | Defn's Nathon Coonrod MD and Primary Health Care Center's Reply Memorandum in Suppt of their Motn for New Trial, or in the Alternative Motn to Amend Jdmt for Remittitur and Motn for Jdmt Notwithstanding the Verdict | Gregory M Culet |
| | Defn's Nathon Coonrod MD and Primary Health Care Center's Reply Memorandum in Suppt of their Objection to the Jdmt upon the Verdict and Motn to Alter or Amend the Jdmt to Apply the Statutory cap on Non-Economic damages to All Plnt's Collectively | Gregory M Culet |
| 6/30/2009 | Affidavit of Steven K Tolman | Gregory M Culet |
| 7/1/2009 | Hearing result for Motion Hearing held on 07/01/2009 09:00 AM: District Court Hearing Held Court Reporter:Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100 pages memo of costs/ disallow costs | Gregory M Culet |
| | Hearing result for Motion Hearing held on 07/01/2009 09:00 AM: Interim Hearing Held memo of costs/ disallow costs | Gregory M Culet |
| 8/24/2009 | Notice of Telephonic Hearing Re: Court Rulings on Post Trial Motions 8-27-09 (fax) | Gregory M Culet |
| | Hearing Scheduled (Review Hearing 08/27/2009 08:30 AM) telephonic Re: court rulings onpost trial motions | Gregory M Culet |
| 8/25/2009 | Memorandum Decision and Order on Post Trial Motions, Denying Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, But Partially Granting Motion to Amend the Judgment to Apply the Statutory Cap by Applying the Cap to Each Named Plaintiff Individually | Gregory M Culet |
| 8/26/2009 | Notice Of Appearance for Nathan Coonrod MD and Primary Health (fax | Gregory M Culet |
| 8/27/2009 | Hearing result for Review Hearing held on 08/27/2009 08:30 AM: District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100 pages telephonic Re: court rulings onpost trial motions | Gregory M Culet |
| | Hearing result for Review Hearing held on 08/27/2009 08:30 AM: Continued telephonic Re: court rulings onpost trial motions | Gregory M Culet |
| | Hearing Scheduled (Review Hearing 09/02/2009 08:30 AM) telephonic Re: court rulings onpost trial motions | Gregory M Culet |
| 9/2/2009 | Hearing result for Review Hearing held on 09/02/2009 08:30 AM: Hearing Held telephonic Re: court rulings onpost trial motions - costs granted | Gregory M Culet |
| | Hearing result for Review Hearing held on 09/02/2009 08:30 AM: District Court Hearing Held Court Reporter: Debora Kreidler Number of Transcript Pages for this hearing estimated: less than 100 pages | Gregory M Culet |
| | Objection to Plnt's Proposed Amended Jdmt | Gregory M Culet |

Other Claims

| Date | | Judge |
|------------|---|-----------------|
| 9/9/2009 | Response to Defendants' Objection to Plaintiffs' Proposed Amended Judgment (fax) | Gregory M Culet |
| 9/11/2009 | Affidavit of Steven J Hippler | Gregory M Culet |
| 9/15/2009 | Order on Plaintiffs Verified Memo of Costs | Gregory M Culet |
| | Amended Judgment | Gregory M Culet |
| 9/29/2009 | Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Tolman, Steven K (attorney for Coonrod, MD, Nathan) Receipt number: 0419265 Dated: 9/29/2009 Amount: \$101.00 (Check) For: Coonrod, MD, Nathan (defendant) | Gregory M Culet |
| | Appealed To The Supreme Court (Def Nathan Coonrod MD & Promary Health Care Center | Gregory M Culet |
| | Notice of Appeal Supreme court (Nathan Coonrod MD & Primary Health Care Center | Gregory M Culet |
| | Case Status Changed: Reopened | Gregory M Culet |
| | Bond Posted - Cash (Receipt 419267 Dated 9/29/2009 for 300.00) \$100 Clerks Record \$200 Court Reporters | Gregory M Culet |
| 10/26/2009 | Motion to stay execution | Gregory M Culet |
| | Notice of posting supersedeas bond | Gregory M Culet |
| | Order for Stay of Execution | Gregory M Culet |
| 10/28/2009 | Hearing Scheduled (Conference - Status 10/29/2009 01:15 PM) telephonic- court to initiate call | Gregory M Culet |
| 10/29/2009 | Amended Notice of Appeal | Gregory M Culet |
| | Hearing result for Conference - Status held on 10/29/2009 01:15 PM: District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100 pages telephonic- court to initiate call | Gregory M Culet |
| | Hearing result for Conference - Status held on 10/29/2009 01:15 PM: Hearing Held telephonic- court to initiate call | Gregory M Culet |
| 10/30/2009 | Notice of Posting Substitute Supersedeas Bond | Gregory M Culet |
| 11/2/2009 | Amended Order for Stay of Execution | Gregory M Culet |
| 12/9/2009 | S C - Order Granting Court Reporter's Motion for Extension of Time (2) | Gregory M Culet |

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ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A. Aguilar,
deceased, and as the natural father and
guardian of GUADALUPE MARIA AGUILAR,
[REDACTED] AGUILAR, and [REDACTED]
AGUILAR, minors, and JOSE AGUILAR, JR.,
heirs of Maria A. Aguilar, deceased,
Plaintiffs,

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,
M.D., NATHAN COONROD, M.D., CATHERINE
ATUP-LEAVITT, M.D., MITCHELL LONG, D.O.,
COLUMBIA WEST VALLEY MEDICAL
CENTER, an Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an Idaho
corporation, JOHN and JANE DOES I through X,
employees of one or more of the Defendants,
Defendants.

Case No. C105-5781

COMPLAINT AND DEMAND
FOR JURY TRIAL

Category: A 1
Fee: \$77.00

FILED
A.M. 4:55 P.M.
JUN - 2 2005
CANYON COUNTY CLERK
K ANDERSON, DEPUTY

COME NOW Plaintiffs above-named, by and through their attorneys of record,
and complain and allege as follows:

I.

GENERAL ALLEGATIONS

1.

Plaintiff, Jose Aguilar, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the surviving spouse and personal representative of the Estate of Maria A. Aguilar, and natural father and guardian of Jose Aguilar, Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar, and [REDACTED] Aguilar.

2.

Plaintiff, Jose Aguilar, Jr., was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

3.

Plaintiff, Guadalupe Maria Aguilar, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

4.

Plaintiff, [REDACTED] Aguilar, a minor, was, at all times relevant hereto, a resident of the state of Idaho, county of Ada, and is the natural child and heir of Maria A. Aguilar, deceased.

5.

Plaintiff, [REDACTED] Aguilar, a minor, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

6.

The amount in controversy exceeds the sum of \$10,000.00, meeting the minimum jurisdictional limits for filing in this Court.

7.

Defendant, Andrew Chai, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

8.

Defendant, Steven R. Newman, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

9.

Defendant, Nathan Coonrod, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

10.

Defendant, Catherine Atup-Leavitt, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

11.

Defendant, Mitchell Long, D.O., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

12.

Defendant, Columbia West Valley Medical Center, is an Idaho business entity, having its principle place of business in Caldwell, Canyon County, Idaho, and acting through its agents and employees.

13.

Defendant, Mercy Medical Center, is an Idaho corporation, having its principle place of business in Nampa, Canyon County, Idaho, and acting through its agents and employees.

14.

Defendant, Primary Health Care Center is an Idaho corporation, having its principle place of business in Nampa, Canyon County, Idaho, and acting through its agents and employees.

15.

Defendants John and Jane Does I through X, whose real names are unknown, were, at the time of the events alleged herein, agents and/or employees of one or more of Defendants above-named, acting within the course and scope of their employment and/or agency relationship with one or more of Defendants at the time of the occurrences alleged herein.

16.

Beginning on or about April 23, 2003, the deceased, Maria A. Aguilar, sought care at various times from the various Defendants for complaints of shortness of breath, fatigue, dizziness, syncope, back pain and weakness, and other signs and symptoms referable to developing pulmonary emboli. On each occasion when she was seen by one or more of the Defendants, she received various explanations and treatment for anemia, heart disease, and gastroesophageal reflux. At no time up through the time that she expired on June 4, 2003, did any of the Defendants offer her any definitive examination and/or treatment for pulmonary emboli, the eventual cause of her death.

On June 4, 2003, Mrs. Aguilar was brought to Defendant Columbia West Valley Medical Center Emergency Room in full cardiac arrest and was pronounced dead shortly thereafter. A subsequent autopsy report revealed that she had suffered multiple bilateral pulmonary emboli, with a saddle embolism in the right and left pulmonary arteries, which were determined to be the cause of her death.

II.

ALLEGATIONS AGAINST DEFENDANT, ANDREW CHAI, M.D.

17.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

18.

Defendant, Andrew Chai, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

19.

Defendant, Andrew Chai, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

III.

ALLEGATIONS AGAINST DEFENDANT, STEVEN R. NEWMAN, M.D.

20.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

21.

Defendant, Steven R. Newman, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

22.

Defendant, Steven R. Newman, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

IV.

ALLEGATIONS AGAINST DEFENDANT, NATHAN COONROD, M.D.

23.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

24.

Defendant, Nathan Coonrod, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

25.

Defendant, Nathan Coonrod, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

V.

ALLEGATIONS AGAINST DEFENDANT, CATHERINE ATUP-LEAVITT, M.D.

26.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

27.

Defendant, Catherine Atup-Leavitt, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

28.

Defendant, Catherine Atup-Leavitt, M.D., breached her duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

VI.

ALLEGATIONS AGAINST DEFENDANT, MITCHELL LONG, D.O.

29.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

30.

Defendant, Mitchell Long, D.O., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

31.

Defendant, Mitchell Long, D.O., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

VII.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL CENTER – *Respondeat Superior*

32.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

33.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a hospital of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

34.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

VIII.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL CENTER – Corporate Negligence

35.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

36.

Defendant, Columbia West Valley Medical Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response

or conduct in the face of circumstances such as that presented by
Plaintiffs' decedent, Maria A. Aguilar.

37.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

IX.

ALLEGATIONS AGAINST DEFENDANT, MERCY MEDICAL CENTER –
Respondeat Superior

38.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

39.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a hospital of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

40.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

X.

ALLEGATIONS AGAINST MERCY MEDICAL CENTER –
Corporate Negligence

41.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

42.

Defendant, Mercy Medical Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response or conduct in the face of circumstances such as that presented by Plaintiffs' decedent, Maria A. Aguilar.

43.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and

grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XI.

**ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER –
Respondeat Superior**

44.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

45.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a facility of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

46.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XII.

**ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER –
Corporate Negligence**

47.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

48.

Defendant, Primary Health Care Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response or conduct in the face of circumstances such as that presented by Plaintiffs' decedent, Maria A. Aguilar.

49.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XIII.

**ALLEGATIONS AGAINST JOHN AND JANE DOES I THROUGH X,
WHOSE REAL NAMES ARE UNKNOWN**

50.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

51.

Defendants John and Jane Does I through X, whose real names are unknown, were employees and/or agents of one or more of Defendants above-named, who individually and collectively owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in May 2003.

52.

Defendants John and Jane Does I through X, whose real names are unknown, breached their duties and were negligent, reckless, and grossly negligent in the provision or withholding of medical, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XIV.

CAUSATION

53.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

54.

As a direct and proximate result of the negligence, recklessness, and gross negligence of these Defendants, Plaintiffs' decedent, Maria A. Aguilar, expired on June 4, 2003.

XV.

DAMAGES

55.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

56.

As a result of Defendants' acts of negligence, recklessness, and gross negligence as defined herein, Plaintiffs are entitled to recover all damages allowed by law, including, but not limited to:

- a. Loss of the support, maintenance, guidance, and assistance of Plaintiffs' Decedent, Maria A. Aguilar;
- b. Medical expenses and funeral expenses;
- c. With regard to Plaintiff, Jose Aguilar, for the loss of the services, comfort, care, society, and companionship of his wife, the decedent, Maria A. Aguilar;
- d. With regard to Plaintiffs, Jose Aguilar Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar, and [REDACTED] Aguilar, for the loss of the services, comfort, care, society, and companionship of their mother, Maria A. Aguilar.

REQUEST FOR ATTORNEYS' FEES AND COSTS

As a direct and proximate result of the aforementioned negligence, recklessness, and gross negligence of Defendants, Plaintiffs have been compelled to retain attorneys to represent them in this action. Plaintiffs have retained the law firm of Comstock & Bush and Byron V. Foster, Attorney at Law, to represent them in this action and are entitled to reasonable attorneys' fees and costs.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

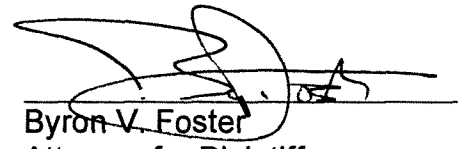
1. Loss of the support, maintenance, guidance and assistance of Plaintiffs' decedent, Maria A. Aguilar;
2. Medical expenses and funeral expenses;
3. With regard to Plaintiff, Jose Aguilar, for the loss of the services, comfort, care, society, and companionship of his wife, Maria A. Aguilar;
4. With regard to Plaintiffs, Jose Aguilar Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar and [REDACTED] Aguilar, for the loss of the services, comfort, care, society, and companionship of their mother, Maria A. Aguilar.
5. For reasonable attorneys' fees and costs of suit; and
6. For such other and further damages as may be given under all the circumstances of the case as may be just.

RESPECTFULLY SUBMITTED This 2nd day of June 2005.

COMSTOCK AND BUSH



David E. Comstock, Of the Firm
Attorneys for Plaintiffs



Byron V. Foster
Attorney for Plaintiffs

ORIGINAL

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Telephone: (208) 344-7700
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ISB #: 2455

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Facsimile: (208) 344-7721
ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A. Aguilar,
deceased, and as the natural father and
guardian of GUADALUPE MARIA AGUILAR,
[REDACTED] AGUILAR, and [REDACTED]
AGUILAR, minors, and JOSE AGUILAR, JR.,
heirs of Maria A. Aguilar, deceased,
Plaintiffs,

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,
M.D., NATHAN COONROD, M.D., CATHERINE
ATUP-LEAVITT, M.D., MITCHELL LONG, D.O.,
COLUMBIA WEST VALLEY MEDICAL
CENTER, an Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an Idaho
corporation, JOHN and JANE DOES I through X,
employees of one or more of the Defendants,
Defendants.

FILED
A.M. 3:15 P.M.

FEB 28 2006


CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Case No. CV 05-5781

**VOLUNTARY NOTICE OF
DISMISSAL OF DEFENDANT
CATHERIN ATUP-LEAVITT,
M.D.**

COME NOW, The Plaintiffs, by and through their counsel of record, Byron V. Foster, and pursuant to Rule 41(a)(1) of the Idaho Rules of Civil Procedure, hereby gives notice that the Complaint against Defendant Catherin Arup-Leavitt, M.D. in the above-entitled matter, shall be dismissed with prejudice.

DATED This 27 day of February, 2006.

A handwritten signature in black ink, appearing to read 'Byron V. Foster', is written over a horizontal line.

Byron V. Foster
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of February 2006, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Andrew C. Brassey, Esq.
Brassey Wetherell Crawford &
McCurdy LLP
203 W. Main St.
Boise, ID 83702

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☐ Hand Delivery
☐ Facsimile (208) 344-7077

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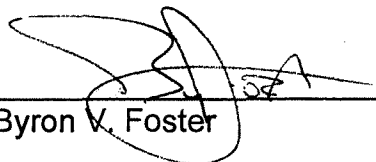
☒ U.S. Mail
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David R. Lombardi, Esq.
Givens Pursley LLP
601 W. Bannock St.
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Boise, ID 83701-2720

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☐ Facsimile (208) 208-232-0150


Byron V. Foster

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W:\1\1-889.51\Answer.doc

Attorneys for Defendant West Valley Medical Center

FILED
A.M. 7:10 P.M.
MAR 07 2006

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of
Maria A. Aguilar, deceased, and as the
natural father and guardian of GUADALUPE
MARIA AGUILAR, [REDACTED]
AGUILAR, and [REDACTED] AGUILAR,
minors, and JOSE AGUILAR, JR., heirs of
Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., CATHERINE ATUP-LEAVITT,
M.D., MITCHELL LONG, D.O.,
COLUMBIA WEST VALLEY MEDICAL
CENTER, and Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation,
and PRIMARY HEALTH CARE CENTER,
an Idaho corporation, JOHN and JANE
DOES I through X, employees of one or more
of the Defendants,

Defendants.

Case No. CV 05-5781

**ANSWER TO COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW, defendant West Valley Medical Center (West Valley), by and through its counsel of record Hall, Farley, Oberrecht & Blanton, P.A., in answer to plaintiffs' verified Complaint and Demand for Jury Trial on file herein, answers, alleges, and states as follows:

FIRST DEFENSE

Plaintiffs' Complaint, and each and every allegation contained therein, fails to state a claim upon which relief can be granted against West Valley.

SECOND DEFENSE

West Valley denies, based upon lack of knowledge, and/or a belief that the allegations are untrue, each and every allegation contained in plaintiffs' Complaint which is not expressly and specifically admitted herein.

THIRD DEFENSE

With respect to the specific allegations contained in plaintiff's Complaint, West Valley admits, denies, and alleges as follows:

I.

West Valley is without sufficient information or knowledge to admit or deny the allegations contained in paragraphs 1-11 of plaintiffs' Complaint and, therefore, denies the same.

West Valley denies that its name includes the word "Columbia."

West Valley admits it has its principal place of business in Caldwell, Idaho.

West Valley is without sufficient information or knowledge to admit or deny the allegations contained in paragraphs 13-15 of plaintiffs' Complaint and, therefore, denies the same.

West Valley denies the accuracy of the narrative set forth in paragraph 16 and further denies any allegations contained therein. West Valley admits only that Maria Aguilar was brought to the West Valley emergency room on June 4, 2003.

II.

West Valley is not required to respond to paragraph 17, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 18 and 19 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

III.

West Valley is not required to respond to paragraph 20, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 21 and 22 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

IV.

West Valley is not required to respond to paragraph 23, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 24 and 25 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

V.

West Valley is not required to respond to paragraph 26, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 27 and 28 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

VI.

West Valley is not required to respond to paragraph 29, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 30 and 31 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

VII.

West Valley is not required to respond to paragraph 32, but to the extent that a response is necessary, West Valley denies the same.

West Valley avers that the duties owed by it and its employees are set forth in Idaho Code §§ 6-1012 and 6-1013, and denies the allegations contained in paragraph 33 to the extent they are inconsistent with those statutes.

West Valley denies the allegations contained in paragraph 34.

VIII.

West Valley is not required to respond to paragraph 35, but to the extent that a response is necessary, West Valley denies the same.

West Valley avers that the duties owed by it and its employees are set forth in Idaho Code §§ 6-1012 and 6-1013, and denies the allegations contained in paragraph 36 to the extent they are inconsistent with those statutes.

West Valley denies the allegations contained in paragraph 37.

IX.

West Valley is not required to respond to paragraph 38, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 39 and 40 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

X.

West Valley is not required to respond to paragraph 41, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 42 and 43 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

XI.

West Valley is not required to respond to paragraph 44, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 45 and 46 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

XII.

West Valley is not required to respond to paragraph 47, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 48 and 49 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

XIII.

West Valley is not required to respond to paragraph 50, but to the extent that a response is necessary, West Valley denies the same.

The allegations contained in paragraphs 51 and 52 are not directed towards West Valley and, therefore, require no answer. To the extent that any of the above stated allegations apply to West Valley, it denies the same.

XIV.

West Valley is not required to respond to paragraph 53, but to the extent that a response is necessary, West Valley denies the same.

West Valley denies the allegations contained in paragraph 54.

XV.

West Valley is not required to respond to paragraph 55, but to the extent that a response is necessary, West Valley denies the same.

West Valley denies the allegations contained in paragraph 56.

AFFIRMATIVE DEFENSES

By pleading certain defenses as "affirmative defenses," West Valley does not imply that it has the burden of proof for any such defense. Furthermore, as West Valley has not had the opportunity to conduct discovery in this case, West Valley, by failing to raise an affirmative defense, does not waive any such defense and specifically reserves the right to amend its answer to include additional affirmative defenses.

FIRST AFFIRMATIVE DEFENSE

The allegations in the Complaint fail to state a claim upon which relief may be granted against West Valley.

SECOND AFFIRMATIVE DEFENSE

Maria Aguilar failed to take reasonable steps to mitigate the damages, if any, and to protect herself from avoidable consequences; plaintiffs' right to recovery, if any, is thereby reduced or barred.

THIRD AFFIRMATIVE DEFENSE

The plaintiffs' injuries and damages, if any, were proximately caused, in whole or in part, by the acts or omissions of Maria Aguilar or persons or entities other than West Valley. As such, those acts or omissions constitute intervening, superseding causes of the damages alleged by the plaintiffs and preclude the plaintiffs' recovery from West Valley.

FOURTH AFFIRMATIVE DEFENSE

The acts or omissions of Maria Aguilar or persons or entities other than West Valley constitute comparative negligence, which bars or reduces plaintiffs' recovery against West Valley, if any, pursuant to Idaho Code § 6-801 and other applicable law.

FIFTH AFFIRMATIVE DEFENSE

West Valley's treatment of Maria Aguilar at all times met the applicable standard of care.

SIXTH AFFIRMATIVE DEFENSE

No act or omission of West Valley caused any damage to plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are limited by Idaho Code §§ 6-1602, 6-1603, 6-1604, and 6-1606.

EIGHTH AFFIRMATIVE DEFENSE

The damages suffered by plaintiffs, if any, were naturally and proximately caused by the progression of Maria Aguilar's preexisting condition or other causes, and not by any act or omission of West Valley.

NINTH AFFIRMATIVE DEFENSE

The damages alleged to have been suffered by plaintiffs, if any, were caused by superseding and/or intervening causes for which West Valley is not responsible.

CLAIM FOR ATTORNEY'S FEES

West Valley has been required to retain counsel to defend this action, and is entitled to recover reasonable attorney fees and costs from plaintiffs pursuant to Idaho Code §§ 12-120 and 12-121 and Idaho Rule of Civil Procedure 51.

DEMAND FOR JURY TRIAL

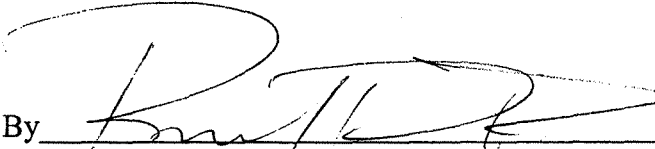
Pursuant to Idaho law, West Valley demands a trial by a jury for all issues so triable.

WHEREFORE, West Valley prays for judgment as follows:

1. That plaintiffs' Complaint be dismissed against West Valley with prejudice and that plaintiffs take nothing thereby;
2. That West Valley be awarded his costs and reasonable attorney fees incurred in this action; and
3. For such other and further relief as the Court deems just and equitable.

DATED this 6th day of March, 2006.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By 

Raymond D. Powers - Of the Firm
Attorneys for Defendant
West Valley Medical Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of March, 2006, I caused to be served a true copy of the foregoing **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL**, by the method indicated below, and addressed to each of the following:

David E. Comstock
Law Offices of Comstock & Bush
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P.O. Box 2774
Boise, Idaho 83701-2774
(208) 344-7721
Attorneys for Plaintiffs


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Attorneys for Plaintiffs

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Attorneys for Defendant Mitchell Long, D.O.

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jeg@moffatt.com
17230.0107

Attorneys for Steven R. Newman, M.D.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A. Aguilar,
deceased, and as the natural father and guardian of
GUADALUPE MARIA AGUILAR,
[REDACTED] AGUILAR, AND [REDACTED]
AGUILAR, minors, and JOSE AGUILAR, JR.,
heirs of Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,
M.D., NATHAN COONROD, M.D. CATHERINE
ATUP-LEAVITT, M.D., MITCHELL LONG,
D.O., COLUMBIA WEST VALLEY MEDICAL
CENTER, an Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation,
PRIMARY HEALTH CARE CENTER, an Idaho
corporation, JOHN and JANE DOES, I through X,
employees of one or more of the Defendants,

Defendants.

FILED
A.M. 12:30 P.M.

MAY 08 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Case No. CV 05-5781

**STEVEN R. NEWMAN, M.D.'S
ANSWER TO COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW defendant, Steven R. Newman, M.D., by and through undersigned counsel, and responds to the Complaint as follows:

FIRST DEFENSE

I.

The plaintiffs' Complaint fails to state a cause of action upon which relief can be granted against Dr. Newman.

SECOND DEFENSE

II.

Dr. Newman denies each and every allegation of the plaintiffs' Complaint that is not expressly and specifically admitted in this Answer. The allegations are denied based upon Dr. Newman's belief that they are incorrect, false and/or misconstrue facts, or are denied based upon the lack of sufficient information on the part of Dr. Newman to admit or deny the same.

III.

Responding to Paragraphs 1, 2, 3, 4, and 5 of the plaintiffs' Complaint, Dr. Newman lacks sufficient information and/or knowledge to admit or deny the allegations in these paragraphs and, therefore, denies the same on that basis at this time.

IV.

Responding to Paragraph 6 of the plaintiffs' Complaint, the allegations in this paragraph make no factual assertions and, therefore, require no response from Dr. Newman. In the alternative, Dr. Newman denies the same.

V.

Responding to Paragraph 7 of the plaintiffs' Complaint, the allegations in this paragraph are directed to a defendant other than Dr. Newman and, therefore, require no response from him.

VI.

Responding to Paragraph 8 of the plaintiffs' Complaint, Dr. Newman admits that he is a resident of Idaho and licensed to practice medicine in Idaho.

VII.

Responding to Paragraphs 9, 10, 11, 12, 13, 14, and 15 of the plaintiffs' Complaint, the allegations in these paragraphs are directed to a defendant or defendants other than Dr. Newman and, therefore, require no response from him.

VIII.

Responding to Paragraph 16 of the plaintiff's Complaint, to the extent that the allegations in this paragraph apply to Dr. Newman, Dr. Newman defers to Maria Aguilar's medical records. To the extent the allegations in Paragraph 16 misconstrue Maria Aguilar's medical records, Dr. Newman denies.

IX.

Responding to Paragraphs 17, 18, and 19 of the plaintiffs' Complaint, the allegations in these paragraphs are directed to a defendant other than Dr. Newman and, therefore, require no response from him. Alternatively, Dr. Newman lacks sufficient information and/or knowledge to admit or deny the allegations in these paragraphs and therefore denies the same on that basis at this time.

X.

Responding to Paragraphs 20, 21, and 22 of the plaintiffs' Complaint, Dr. Newman denies.

XI.

Responding to Paragraphs 23 through 52 of the plaintiffs' Complaint, the allegations in these paragraphs are directed to a defendant or defendants other than Dr. Newman and, therefore, require no response from him. Alternatively, Dr. Newman lacks sufficient information and/or knowledge to admit or deny the allegations in these paragraphs and therefore denies the same on that basis at this time.

XII.

Responding to Paragraphs 53, 54, 55, and 56 of the plaintiffs' Complaint, Dr. Newman denies.

XIII.

Responding to the prayer for relief, Dr. Newman denies that he is liable to the plaintiffs for any damages, attorney fees, or costs.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

XIV.

By raising the following defenses, Dr. Newman makes no admission of any kind and does not assume any burdens of proof or production not otherwise properly resting upon him in this lawsuit. Rather, Dr. Newman merely identifies defenses to preserve them for all proper uses under applicable law. Dr. Newman has yet to complete discovery in this case, the result of

which may reveal additional defenses to the plaintiffs' complaint. As such, Dr. Newman reserves the right to supplement, modify, or delete defenses after discovery is completed.

SECOND AFFIRMATIVE DEFENSE

XV.

Recovery against Dr. Newman is barred because no act or omission on his part caused or contributed to the plaintiffs' alleged damages.

THIRD AFFIRMATIVE DEFENSE

XVI.

The injury and damage, if any, allegedly sustained by the plaintiffs may have been proximately caused by the negligence or fault of parties, persons, or entities other than Dr. Newman, including plaintiffs, and the negligence of all such entities must be compared pursuant to the comparative negligence laws of the state of Idaho. In asserting this defense, Dr. Newman does not admit any negligent conduct, and to the contrary, expressly denies any such conduct on his part.

FOURTH AFFIRMATIVE DEFENSE

XVII.

The plaintiffs' damages, if any, may have been caused by acts both superseding and intervening, and/or omissions of parties and entities other than Dr. Newman, over whom he had no control and no right of control.

FIFTH AFFIRMATIVE DEFENSE

XVIII.

The plaintiffs may have failed to mitigate their damages as required by law.

SIXTH AFFIRMATIVE DEFENSE

XIX.

Dr. Newman met the applicable standard of health care practice ordinarily provided by other similar health care providers in good standing in the same community. At the time and place of the alleged malpractice, and at all times, Dr. Newman used reasonable care and diligence in the exercise of his judgment, skill, and application of his learning in accordance with his best judgment. Dr. Newman in no way breached or deviated from the standard of care with providing these services. To the contrary, Dr. Newman rendered the same medical treatment as would have been rendered by other health care providers of similar expertise at the time that the services were provided.

SEVENTH AFFIRMATIVE DEFENSE

XX.

Plaintiffs' claims may be barred by the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

XXI.

To the extent that the plaintiffs have received compensation from collateral sources for the damages of which they complain, the plaintiffs are barred from recovery of such sums from Dr. Newman pursuant to provisions of Idaho Code § 6-1606, or other law. Dr. Newman is entitled to a set off against the plaintiffs' damages, if any, for the amount they have been compensated by any other person, entity, corporation, insurance fund, or a governmental program.

NINTH AFFIRMATIVE DEFENSE

XXII.

Plaintiffs cannot recover any damages against Dr. Newman on the basis that Dr. Newman did not do anything or fail to do anything which resulted in or caused the plaintiffs' alleged damages.

TENTH AFFIRMATIVE DEFENSE

XXIII.

The plaintiffs' damages, if any, are subject to the limitation on non-economic damages pursuant to Idaho Code § 6-1603.

WHEREFORE, Dr. Newman prays for judgment:


1. Dismissing the plaintiffs' complaint against him, with prejudice, without granting any relief against him;
2. Awarding Dr. Newman his reasonable costs and attorney fees incurred in defending this action;
3. For other such relief as the Court deems to be just and equitable under the circumstances.

DEMAND FOR JURY TRIAL

Dr. Newman hereby demands a jury trial for all claims and causes of action stated by this Answer, pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED this 5 day of May, 2006.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Gary T. Dance – Of the Firm
Attorneys for Steven R. Newman, M.D.

CERTIFICATE OF SERVICE

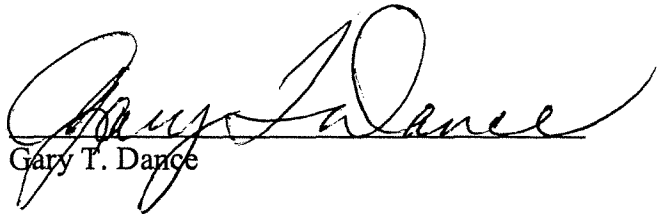
I HEREBY CERTIFY that on this ____ day of May, 2006, I caused a true and correct copy of the foregoing **STEVEN R. NEWMAN, M.D.'S ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL** to be served by the method indicated below, and addressed to the following:

David E. Comstock
LAW OFFICES OF COMSTOCK & BUSH
199 N. Capitol Blvd., Suite 500
P.O. Box 2774
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Facsimile: (208) 344-7721

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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

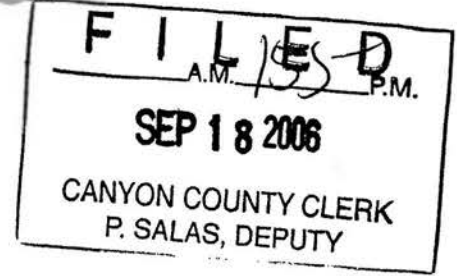
Byron V. Foster
Attorney-at-law
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Gary T. Dance

ORIGINAL

Andrew C. Brassey (ISB No. 2128)
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203 W. Main Street
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Attorneys for Defendant Andrew Chai, M.D.

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of Maria
A. Aguilar, deceased, and as the natural father
and guardian of GUADALUPE MARIA
AGUILAR, [REDACTED] AGUILAR, and
[REDACTED] AGUILAR, minors, and JOSE
AGUILAR, JR., heirs of Maria A. Aguilar,
deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D. NATHAN COONROD,
M.D., CATHERINE ATUP-LEAVITT, M.D.
MITCHELL LONG, D.O., COLUMBIA
WEST VALLEY MEDICAL CENTER, an
Idaho corporation, MERCY MEDICAL
CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an
Idaho corporation, JOHN and JANE DOES I
through X, employees of one or more of the
Defendants,

Defendants.

Case No. CV05-5781

**ANSWER AND DEMAND FOR
JURY TRIAL**

COMES NOW Defendant Andrew Chai, M.D., by and through his counsel of record, Brassey, Wetherell, Crawford & Garrett, and answers Plaintiffs' Complaint on file herein as follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim against this Defendant upon which relief may be granted.

SECOND DEFENSE

Defendant denies each and every allegation contained in Plaintiffs' Complaint not herein expressly and specifically admitted.

I.

This answering Defendant admits he is a citizen of the state of Idaho and is a physician licensed to practice medicine in the state of Idaho.

THIRD DEFENSE

The damages and injuries sustained by Plaintiffs, if any, were proximately caused by the negligence or fault of parties, persons, or entities other than this answering Defendant whom Defendant does not control and over whom Defendant had no control.

FOURTH DEFENSE

The injuries and damages sustained by Plaintiffs, if any, were proximately caused by the intervening, superseding negligence of third parties who are not parties to this suit. By asserting this defense, Defendant does not admit that Plaintiffs have been damaged.

FIFTH DEFENSE

Plaintiffs are not the real party in interest as respects all or a portion of their claim for damages.

SIXTH DEFENSE

The decedent's injuries, if any, were the result of a pre-existing condition or disease.

SEVENTH DEFENSE

Plaintiffs' claims for damages, if any, are barred by the statute of limitations, including Idaho Code § 5 -219.

EIGHTH DEFENSE

Plaintiffs' claims for damages if any, are limited by Idaho Code §§ 6-1603 and 6-1606.

NINTH DEFENSE

There exists no causation or proximate causation between any alleged act or alleged breach of duty by this answering Defendant and Plaintiffs' alleged damages, and Plaintiffs' alleged injuries and damages, if any, were proximately caused by the negligence or fault of persons or entities other than this Defendant. In asserting this defense, this Defendant does not admit he was negligent.

TENTH DEFENSE

The treatment rendered by this Defendant at all times met the applicable standard of health care and no alleged act or omission of this Defendant proximately caused Plaintiffs' damages, if any.

ELEVENTH DEFENSE

Plaintiffs and Plaintiffs' decedent were guilty of negligence in connection with the matters and damages alleged, which proximately caused and/or contributed to Plaintiffs' and Plaintiffs' decedent's injuries and damages, if any. The negligence of Plaintiffs' and Plaintiffs' decedent was at least equal to or exceeded any negligence of this Defendant. By asserting this defense, Defendant does not admit this Defendant was negligent.

TWELFTH DEFENSE

Discovery is ongoing in this matter, and because of such ongoing discovery, this answering Defendant respectfully reserves the right to amend and/or supplement this Answer as may be necessary.

WHEREFORE, Defendant prays for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by this Complaint;
2. That the Complaint in this matter be dismissed with prejudice;
3. That Defendant be awarded costs expended in this matter;
4. That Defendant be awarded attorney fees pursuant to the Idaho Rules of Civil Procedure, and the statutes of the State of Idaho including I.C. §12-120 and §12-121; and
5. For such other and further relief as the court may deem just.

DEMAND FOR JURY TRIAL

The Defendant demands a trial by jury, composed of no less than twelve (12) persons, on all issues, claims and defenses so triable, pursuant to the constitutions and laws of the United States and the State of Idaho.

DATED this 14th day of September, 2006.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By 

Andrew C. Brassey, Of the Firm
Attorneys for Defendant Andrew Chai, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2006, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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BUSH
199 North Capitol Boulevard, Suite 500
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Byron V. Foster
Attorney at Law
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MOFFATT, THOMAS, BARRETT,
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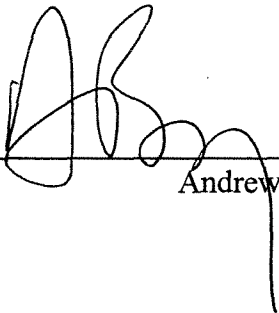
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*Attorney for Defendant Mitchell Long,
D.O.*

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Andrew C. Brassey

David R. Lombardi
J. Will Varin
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Telephone Number: (208) 388-1200
Facsimile: (208) 388-1300
David R. Lombardi ISB # 1965
J. Will Varin ISB # 6981
S:\CLIENTS\2518\94\Answer.DOC

F I L E D
A.M. 1:33 P.M.

SEP 21 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Attorneys for Defendant Mercy Medical Center

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A.
Aguilar, deceased, and as the natural father and
guardian of GUADALUPE MARIA
AGUILAR, [REDACTED] AGUILAR, and
[REDACTED] AGUILAR, minors, and JOSE
AGUILAR, JR., heirs of Maria A. Aguilar,
deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., CATHERINE ATUP-LEAVITT, M.D.,
MITCHELL LONG, D.O., COLUMBIA
WEST VALLEY MEDICAL CENTER, an
Idaho corporation, MERCY MEDICAL
CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an
Idaho corporation, JOHN and JANE DOES I
through X, employees of one or more of the
Defendants,

Defendants.

CASE NO.: CV 05-5781

**MERCY MEDICAL CENTER'S
ANSWER TO COMPLAINT AND
DEMAND FOR JURY TRIAL**

Defendant Mercy Medical Center ("Mercy") responds to Plaintiffs' Complaint and Demand for Jury Trial ("Plaintiffs' Complaint") as follows:

FIRST DEFENSE

Plaintiffs' Complaint, or portions thereof, fail to state a claim upon which relief can be granted.

SECOND DEFENSE

Mercy denies each and every allegation not specifically admitted herein.

THIRD DEFENSE

GENERAL ALLEGATIONS

1. Mercy admits the allegations contained in paragraphs 1 through 7 of Plaintiffs' Complaint.
2. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraphs 8-10 of Plaintiffs' Complaint, and, therefore, denies them.
3. Mercy admits the allegations contained at paragraphs 11-14 of Plaintiffs' Complaint.
4. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 15 of Plaintiffs' Complaint, and, therefore, denies them.
5. As to the allegations contained in paragraph 16 of Plaintiffs' Complaint, Mercy admits that at various times during 2003 Maria A. Aguilar presented at several health care providers with the signs and symptoms reported by her and documented in Mercy's medical records. Mercy further admits Maria A. Aguilar was pronounced dead on June 4, 2003. Mercy denies all other allegations contained in paragraph 16 of Plaintiffs' Complaint.

ALLEGATIONS AGAINST DEFENDANT, ANDREW CHAI, M.D.

6. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 17 of Plaintiffs' Complaint.
7. Mercy admits that Defendant, Andrew Chai, M.D., owed Maria A. Aguilar the duties set

forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 18 of Plaintiff's Complaint that are inconsistent therewith.

8. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 19 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, STEVEN R. NEWMAN, M.D.

9. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 20 of Plaintiffs' Complaint.

10. Mercy admits that Defendant, Steven R. Newman, M.D., owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 21 of Plaintiff's Complaint that are inconsistent therewith.

11. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 22 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, NATHAN COONROD, M.D.

12. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 23 of Plaintiffs' Complaint.

13. Mercy admits that Defendant, Nathan Coonrod, M.D., owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 24 of Plaintiff's Complaint that are inconsistent therewith.

14. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 25 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, CATHERINE ATUP-LEAVITT, M.D.

15. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 26 of Plaintiffs' Complaint.

16. Mercy admits that Defendant, Catherine Atup-Leavitt, M.D., owed Maria A. Aguilar the

duties set forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 27 of Plaintiff's Complaint that are inconsistent therewith.

17. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 28 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, MITCHELL LONG, D.O.

18. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 29 of Plaintiffs' Complaint.

19. Mercy admits that Defendant, Mitchell Long, D.O., owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 30 of Plaintiff's Complaint that are inconsistent therewith.

20. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 31 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL

CENTER-Respondeat Superior

21. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 32 of Plaintiffs' Complaint.

22. Mercy admits that Defendant, Columbia West Valley Medical Center, owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code § 6-1012, and denies any allegations of paragraph 33 of Plaintiff's Complaint that are inconsistent therewith.

23. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 34 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL

CENTER-Corporate Negligence

24. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 35 of Plaintiffs' Complaint.

25. Mercy admits only that Defendant, Columbia West Valley Medical Center, owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code §6-1012, and denies any allegations of paragraph 36 and sub-paragraphs a. – d. of Plaintiff's Complaint that are inconsistent therewith.

26. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 37 of Plaintiffs' Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, MERCY MEDICAL CENTER-

Respondeat Superior

27. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 38 of Plaintiffs' Complaint.

28. Mercy admits only that it owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code §6-1012, and denies any allegations of paragraph 39 and of Plaintiffs' Complaint that are inconsistent therewith.

29. Mercy denies the allegations contained at paragraph 40 of Plaintiffs' Complaint.

ALLEGATIONS AGAINST DEFENDANT, MERCY MEDICAL CENTER-

Corporate Negligence

30. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 41 of Plaintiffs' Complaint.

31. Mercy admits only that it owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code §6-1012, and denies any allegations of paragraph 42 and subparagraphs 42 a.

– 42 d. of Plaintiffs’ Complaint that are inconsistent therewith.

32. Mercy denies the allegations contained at paragraph 43 of Plaintiffs’ Complaint.

ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER-

Respondeat Superior

33. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs’ Complaint in response to the allegations contained in paragraph 44 of Plaintiffs’ Complaint.

34. Mercy admits only that Primary Health Care Center owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code §6-1012, and denies any allegations of paragraph 45 and of Plaintiffs’ Complaint that are inconsistent therewith.

35. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 46 of Plaintiffs’ Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER-

Corporate Negligence

36. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs’ Complaint in response to the allegations contained in paragraph 47 of Plaintiffs’ Complaint.

37. Mercy admits only that Primary Health Care Center owed Maria A. Aguilar the duties set forth in Idaho law, including specifically Idaho Code §6-1012, and denies any allegations of paragraph 48 and subparagraphs 48 a. – 48 d. of Plaintiffs’ Complaint that are inconsistent therewith.

38. Mercy is without sufficient knowledge to either admit or deny the allegations contained in paragraph 49 of Plaintiffs’ Complaint, and, therefore, denies them.

ALLEGATIONS AGAINST JOHN AND JANE DOES I THROUGH X

WHOSE REAL NAMES ARE UNKNOWN

39. Paragraphs 50 – 52 do not contain allegations against Mercy Medical Center to which it must respond and Mercy Medical Center is without sufficient knowledge to admit or deny the allegations contained in these paragraphs, and, therefore denies all allegations contained at paragraphs 50 – 52 of Plaintiffs' Complaint.

CAUSATION

40. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 53 of Plaintiffs' Complaint.

41. Mercy denies the allegations contained at paragraph 54 of Plaintiffs' Complaint.

DAMAGES

42. Mercy incorporates by reference its answers to all prior allegations contained in Plaintiffs' Complaint in response to the allegations contained in paragraph 55 of Plaintiffs' Complaint.

43. Mercy denies the allegations contained at paragraphs 56 and subparagraphs 56 a. – 56 d. of Plaintiffs' Complaint.

FOURTH DEFENSE

Mercy Medical Center was not negligent or at fault and did not cause or contribute to any of the damages or injuries set forth in the Complaint.

FIFTH DEFENSE

The damages alleged on behalf of Plaintiff were caused or contributed to by the conduct, acts, or omissions of parties other than Mercy Medical Center, and over which Mercy Medical

Center had no control; which conduct, acts or omissions should be compared with the alleged negligence of Mercy Medical Center, if any, pursuant to the law of comparative negligence.

SIXTH DEFENSE

Plaintiff's damages, if any, are limited by Idaho Code § 6-1603 (limiting non-economic damages) and § 6-1606 (prohibiting double recoveries arising from collateral source payments).

SEVENTH DEFENSE

Mercy Medical Center has not had an opportunity to conduct sufficient investigation and discovery to determine whether additional defenses are available which may be pleaded at this time consistent with the requirements of Rule 11 of the Idaho Rules of Civil Procedure ("I.R.C.P"). Mercy Medical Center reserves the right to move, pursuant to I.R.C.P. 15, to amend its Answer in the event that further investigation and discovery reveal the existence of any such defense or defenses.

DEMAND FOR JURY TRIAL

Mercy Medical Center demands a trial by jury of no less than twelve (12) persons on all issues so triable pursuant to Idaho Rule of Civil Procedure 38(b).

PRAYER FOR RELIEF

WHEREFORE, Mercy Medical Center prays that Plaintiffs' Complaint be dismissed with prejudice, Mercy Medical Center be awarded its costs in defending this action, and that the Court grant Mercy Medical Center such further relief as it deems appropriate.

DATED this 18th day of September, 2006.

GIVENS PURSLEY LLP

By: 

J. Will Varin

Attorneys for Mercy Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2006, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David Comstock
COMSTOCK & BUSH
199 North Capital Blvd., Suite 500
P.O. Box 2774
Boise, ID 83701

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☒ U.S. Mail
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☐ Facsimile

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☐ Facsimile

James Lynch
LYNCH & ASSOCIATES
1412 W. Idaho, Suite 200
P.O. Box 739
Boise, ID 83701-0739

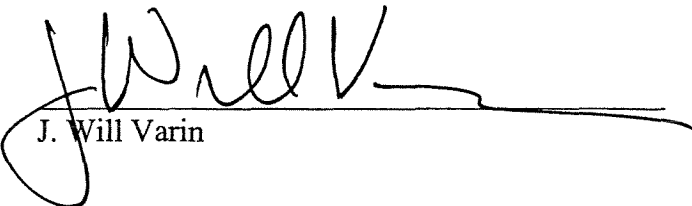
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J. Will Varin

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ISB #: 2455

FILED
A.M. 10:00 P.M.

SEP 27 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

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ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal)
Representative of the Estate of Maria A. Aguilar,)
deceased, and as the natural father and)
guardian of GUADALUPE MARIA AGUILAR,)
[REDACTED] AGUILAR, and [REDACTED])
AGUILAR, minors, and JOSE AGUILAR, JR.,)
heirs of Maria A. Aguilar, deceased,)

Plaintiffs,

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,)
M.D., NATHAN COONROD, M.D., MITCHELL)
LONG, D.O., COLUMBIA WEST VALLEY)
MEDICAL CENTER, an Idaho corporation,)
MERCY MEDICAL CENTER, an Idaho)
corporation, and PRIMARY HEALTH CARE)
CENTER, an Idaho corporation, JOHN and)
JANE DOES I through X, employees of one or)
more of the Defendants,)

Defendants.

Case No. CV 05-5781

**PLAINTIFFS' MOTION FOR
LEAVE TO AMEND COMPLAINT
TO MORE SPECIFICALLY SET
FORTH ALLEGATIONS OF
AGENCY AND NON-
DELEGABLE DUTY AGAINST
DEFENDANTS WEST VALLEY
MEDICAL CENTER, MERCY
MEDICAL CENTER AND
PRIMARY HEALTH CARE
CENTER**


PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT TO MORE SPECIFICALLY SET FORTH
ALLEGATIONS OF AGENCY AND NON-DELEGABLE DUTY AGAINST DEFENDANTS WEST VALLEY
MEDICAL CENTER, MERCY MEDICAL CENTER AND PRIMARY HEALTH CARE CENTER- 1

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COME NOW the Plaintiffs, by and through their attorneys of record, Comstock and Bush, and Byron V. Foster, Attorney at Law, and move this Court for an order allowing Plaintiffs leave to amend their Complaint to more specifically set forth allegations of agency and non-delegable duty against Defendants West Valley Medical Center, Mercy Medical Center and Primary Health Care Center. This motion is made pursuant to Idaho Rule of Civil Procedure 15(a). It is further based upon the pleadings and documents herein and the Proposed Amended Complaint attached as Exhibit "A" to the Affidavit of Byron V. Foster, filed herewith.

The purpose of this motion is to set forth a more definite statement of Plaintiffs' theories of vicarious liability and non-delegable duty against the aforementioned Defendant Hospitals and Primary Health.

DATED this 26 day of September, 2006.



Byron V. Foster
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2006, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Andrew C. Brassey, Esq.
Brassey Wetherell Crawford &
McCurdy LLP
203 W. Main St.
Boise, ID 83702

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Byron V. Foster

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ISB #: 2760

F I L E D
A.M. / 10 P.M.

SEP 27 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal)
Representative of the Estate of Maria A. Aguilar,)
deceased, and as the natural father and)
guardian of GUADALUPE MARIA AGUILAR,)
[REDACTED] AGUILAR, and [REDACTED])
AGUILAR, minors, and JOSE AGUILAR, JR.,)
heirs of Maria A. Aguilar, deceased,)

Plaintiffs,)

v.)

ANDREW CHAI, M.D., STEVEN R. NEWMAN,)
M.D., NATHAN COONROD, M.D., MITCHELL)
LONG, D.O., COLUMBIA WEST VALLEY)
MEDICAL CENTER, an Idaho corporation,)
MERCY MEDICAL CENTER, an Idaho)
corporation, and PRIMARY HEALTH CARE)
CENTER, an Idaho corporation, JOHN and)
JANE DOES I through X, employees of one or)
more of the Defendants,)

Defendants.)

Case No. CV 05-5781

**AFFIDAVIT OF BYRON V.
FOSTER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
LEAVE TO AMEND COMPLAINT**

**AFFIDAVIT OF BYRON V. FOSTER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO
AMEND COMPLAINT - 1**

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STATE OF IDAHO)
 : ss.
County of Ada).

I, Byron V. Foster, being first duly sworn upon oath, deposes and says:


1. That I am an attorney, duly licensed by the State of Idaho Bar Association to practice law in the State of Idaho.

2. That I am one of the attorneys for Plaintiffs Aguilar in the above-referenced lawsuit. I make this affidavit upon my own personal.

3. That attached hereto as Exhibit "A" is a true and correct copy of the proposed Amended Complaint of Plaintiffs Aguilar in the above-referenced lawsuit. The original Complaint has been amended to more specifically set forth allegations of agency and non-delegable duty against Defendants: West Valley Medical Center, Mercy Medical Center and Primary Health Care Center.

4. That the Motion for Leave to File an Amended Complaint is filed well within the deadlines set forth in the Court's Scheduling Order. Counsel for Plaintiffs Aguilar knows of no prejudice to any of the Defendants should this Motion be granted.

FURTHER YOUR AFFIANT SAITH NAUGHT.

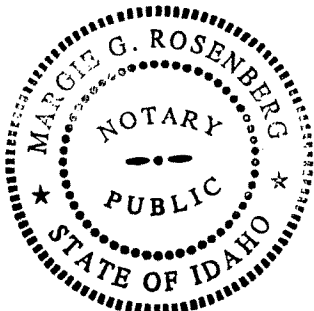

Byron V. Foster

SUBSCRIBED AND SWORN TO BEFORE ME this 26th day of September, 2006.


NOTARY PUBLIC FOR Idaho

Residing at: Boise, ID

My Commission Expires: 5/4/10



AFFIDAVIT OF BYRON V. FOSTER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT - 2

G:\Aguilar\Pleadings\Aff of BVF - Mot Leave to Amend Complaint.doc

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2006, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Brassey Wetherell Crawford &
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Boise, ID 83702

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Byron V. Foster

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ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal)
Representative of the Estate of Maria A. Aguilar,)
deceased, and as the natural father and)
guardian of GUADALUPE MARIA AGUILAR,)
[REDACTED] AGUILAR, and [REDACTED])
AGUILAR, minors, and JOSE AGUILAR, JR.,)
heirs of Maria A. Aguilar, deceased,)
Plaintiffs,)

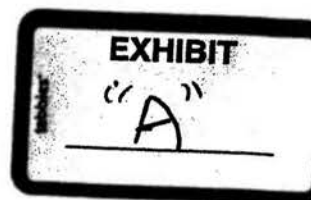
v.)

ANDREW CHAI, M.D., STEVEN R. NEWMAN,)
M.D., NATHAN COONROD, M.D., MITCHELL)
LONG, D.O., COLUMBIA WEST VALLEY)
MEDICAL CENTER, an Idaho corporation,)
MERCY MEDICAL CENTER, an Idaho)
corporation, and PRIMARY HEALTH CARE)
CENTER, an Idaho corporation, JOHN and)
JANE DOES I through X, employees of one or)
more of the Defendants,)

Defendants.)

Case No. CV 05 5781

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**



COME NOW Plaintiffs above-named, by and through their attorneys of record, and complain and allege as follows:

I.

GENERAL ALLEGATIONS

1.

Plaintiff, Jose Aguilar, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the surviving spouse and personal representative of the Estate of Maria A. Aguilar, and natural father and guardian of Jose Aguilar, Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar, and [REDACTED] Aguilar.

2.

Plaintiff, Jose Aguilar, Jr., was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

3.

Plaintiff, Guadalupe Maria Aguilar, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

4.

Plaintiff, [REDACTED] Aguilar, a minor, was, at all times relevant hereto, a resident of the state of Idaho, county of Ada, and is the natural child and heir of Maria A. Aguilar, deceased.

5.

Plaintiff, [REDACTED] Aguilar, a minor, was, at all times relevant hereto, a resident of the state of Idaho, county of Canyon, and is the natural child and heir of Maria A. Aguilar, deceased.

6.

The amount in controversy exceeds the sum of \$10,000.00, meeting the minimum jurisdictional limits for filing in this Court.

7.

Defendant, Andrew Chai, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

8.

Defendant, Steven R. Newman, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

9.

Defendant, Nathan Coonrod, M.D., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

10.

Defendant, Mitchell Long, D.O., is, and at all times pertinent hereto has been, a resident, citizen, and domiciliary of the state of Idaho, and an individual and a physician licensed to practice medicine in the state of Idaho.

11.

Defendant, Columbia West Valley Medical Center, is an Idaho business entity, having its principle place of business in Caldwell, Canyon County, Idaho, and acting through its agents and employees.

12.

Defendant, Mercy Medical Center, is an Idaho corporation, having its principle place of business in Nampa, Canyon County, Idaho, and acting through its agents and employees.

13.

Defendant, Primary Health Care Center is an Idaho corporation, having its principle place of business in Nampa, Canyon County, Idaho, and acting through its agents and employees.

14.

Defendants John and Jane Does I through X, whose real names are unknown, were, at the time of the events alleged herein, agents and/or employees of one or more of Defendants above-named, acting within the course and scope of their employment and/or agency relationship with one or more of Defendants at the time of the occurrences alleged herein.

15.

Beginning on or about April 23, 2003, the deceased, Maria A. Aguilar, sought care at various times from the various Defendants for complaints of shortness of breath, fatigue, dizziness, syncope, back pain and weakness, and other signs and symptoms referable to developing pulmonary emboli. On each occasion when she was seen by one or more of the Defendants, she received various explanations and treatment for anemia, heart disease, and gastroesophageal reflux. At no time up through the time that she expired on June 4, 2003, did any of the Defendants offer her any definitive examination and/or treatment for pulmonary emboli, the eventual cause of her death.

On June 4, 2003, Mrs. Aguilar was brought to Defendant Columbia West Valley Medical Center Emergency Room in full cardiac arrest and was pronounced dead shortly thereafter. A subsequent autopsy report revealed that she had suffered multiple bilateral pulmonary emboli, with a saddle embolism in the right and left pulmonary arteries, which were determined to be the cause of her death.

II.

ALLEGATIONS AGAINST DEFENDANT, ANDREW CHAI, M.D.

16.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

17.

Defendant, Andrew Chai, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

18.

Defendant, Andrew Chai, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

III.

ALLEGATIONS AGAINST DEFENDANT, STEVEN R. NEWMAN, M.D.

19.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

20.

Defendant, Steven R. Newman, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

21.

Defendant, Steven R. Newman, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

22.

At the time Defendant Steven R. Newman, M.D., rendered medical care and treatment to Plaintiffs' decedent, Maria A. Aguilar, Dr. Newman was an emergency room physician at Columbia West Valley Medical Center acting within the course and scope of his employment and/or agency relationship with Defendant Columbia West Valley Medical Center.

IV.

ALLEGATIONS AGAINST DEFENDANT, NATHAN COONROD, M.D.

23.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

24.

Defendant, Nathan Coonrod, M.D., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

25.

Defendant, Nathan Coonrod, M.D., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

26.

At the time Defendant Nathan Coonrod, M.D., rendered medical care and treatment to Plaintiffs' decedent, Maria A. Aguilar, Dr. Coonrod was a physician at Primary Health Care Center acting within the course and scope of his employment and/or agency relationship with Defendant Primary Health Care Center.

V.

ALLEGATIONS AGAINST DEFENDANT, MITCHELL LONG, D.O.

27.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

28.

Defendant, Mitchell Long, D.O., owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in 2003.

29.

Defendant, Mitchell Long, D.O., breached his duties and was medically negligent, reckless, and grossly negligent in the provision or withholding of professional medical services from Plaintiffs' decedent, Maria A. Aguilar.

30.

At the time Defendant Mitchell Long, D.O., rendered medical care and treatment to Plaintiffs' decedent, Maria A. Aguilar, Dr. Mitchell was an emergency room physician at

Mercy Medical Center acting within the course and scope of his employment and/or agency relationship with Defendant Mercy Medical Center.

VI.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL CENTER – *Respondeat Superior*

31.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

32.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a hospital of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

33.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

34.

Defendant, Columbia West Valley Medical Center, as a hospital which provides emergency medical services, accepted a non-delegable duty and remained responsible, pursuant to respondeat superior, apparent agency, and other theories of vicarious liability, for the activities of Defendant Steven R. Newman, M.D. Pursuant to Idaho Code § 39-101,

et seq; Idaho Code § 39-1301(a) and IDAPA 16.03.14, *et seq*, Defendant Columbia West Valley Medical Center remains responsible for the activities of Defendant Steven R. Newman, M.D., as an emergency room physician providing emergency services at Defendant Columbia West Valley Medical Center.

VII.

ALLEGATIONS AGAINST DEFENDANT, COLUMBIA WEST VALLEY MEDICAL CENTER – Corporate Negligence

35.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

36.

Defendant, Columbia West Valley Medical Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response

or conduct in the face of circumstances such as that presented by
Plaintiffs' decedent, Maria A. Aguilar.

37.

Defendant, Columbia West Valley Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

VIII.

ALLEGATIONS AGAINST DEFENDANT, MERCY MEDICAL CENTER –
Respondeat Superior

38.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

39.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a hospital of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

40.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

41.

Defendant, Mercy Medical Center, as a hospital which provides emergency medical services, accepted a non-delegable duty and remained responsible, pursuant to respondeat superior, apparent agency, and other theories of vicarious liability, for the activities of Defendant Mitchell Long, D.O. Pursuant to Idaho Code § 39-101, *et seq*; Idaho Code § 39-1301(a) and IDAPA 16.03.14, *et seq*, Defendant Columbia West Valley Medical Center remains responsible for the activities of Defendant Mitchell Long, D.O., as an emergency room physician providing emergency services at Defendant Mercy Medical Center.

IX.

ALLEGATIONS AGAINST MERCY MEDICAL CENTER –
Corporate Negligence

42.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

43.

Defendant, Mercy Medical Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;

- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response or conduct in the face of circumstances such as that presented by Plaintiffs' decedent, Maria A. Aguilar.

44.

Defendant, Mercy Medical Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

X.

ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER –
Respondeat Superior

45.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

46.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the standard of care for a facility of its type with respect to the provision of medical, hospital, nursing, and related services in Canyon County, Idaho, during May 2003.

47.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

48.

At the time he rendered treatment to decedent, Maria A. Aguilar, Defendant Nathan Coonrod, M.D., was an employee, agent, servant and/or representative of Defendant Primary Health Care Center acting with the course and scope of his employment, agency and/or representative status. Defendant Primary Health Care Center is responsible pursuant to the doctrine of respondeat superior, apparent agency and other agency concepts for the activities Defendant Dr. Coonrod.

XI.

ALLEGATIONS AGAINST DEFENDANT, PRIMARY HEALTH CARE CENTER –
Corporate Negligence

49.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

50.

Defendant, Primary Health Care Center, directly owed to Plaintiffs' decedent, Maria A. Aguilar, duties of care with respect to the provision of medical, hospital, nursing, and related services as follows:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;

- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response or conduct in the face of circumstances such as that presented by Plaintiffs' decedent, Maria A. Aguilar.

51.

Defendant, Primary Health Care Center, acting through its agents, servants, employees, and/or each other, breached its duties and was negligent, reckless, and grossly negligent in the provision or withholding of medical, hospital, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XII.

**ALLEGATIONS AGAINST JOHN AND JANE DOES I THROUGH X,
WHOSE REAL NAMES ARE UNKNOWN**

52.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

53.

Defendants John and Jane Does I through X, whose real names are unknown, were employees and/or agents of one or more of Defendants above-named, who individually

and collectively owed Plaintiffs' decedent, Maria A. Aguilar, a duty to act in all respects within the applicable standard of care in Canyon County, Idaho, in May 2003.

54.

Defendants John and Jane Does I through X, whose real names are unknown, breached their duties and were negligent, reckless, and grossly negligent in the provision or withholding of medical, nursing, and related services from Plaintiffs' decedent, Maria A. Aguilar.

XIII.

CAUSATION

55.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

56.

As a direct and proximate result of the negligence, recklessness, and gross negligence of these Defendants, Plaintiffs' decedent, Maria A. Aguilar, expired on June 4, 2003.

XIV.

DAMAGES

57.

Plaintiffs reallege each and every allegation previously stated and incorporate by reference those allegations as if set forth at length.

58.

As a result of Defendants' acts of negligence, recklessness, and gross negligence as defined herein, Plaintiffs are entitled to recover all damages allowed by law, including, but not limited to:

- a. Loss of the support, including economic support, maintenance, guidance, and assistance of Plaintiffs' Decedent, Maria A. Aguilar;
- b. Medical expenses and funeral expenses;
- c. With regard to Plaintiff, Jose Aguilar, for the loss of the services, comfort, care, society, and companionship of his wife, the decedent, Maria A. Aguilar;
- d. With regard to Plaintiffs, Jose Aguilar Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar, and [REDACTED] Aguilar, for the loss of the services, comfort, care, society, and companionship of their mother, Maria A. Aguilar.

REQUEST FOR ATTORNEYS' FEES AND COSTS

As a direct and proximate result of the aforementioned negligence, recklessness, and gross negligence of Defendants, Plaintiffs have been compelled to retain attorneys to represent them in this action. Plaintiffs have retained the law firm of Comstock & Bush and Byron V. Foster, Attorney at Law, to represent them in this action and are entitled to reasonable attorneys' fees and costs.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in accordance with the provisions of Rule 38(b) of the Idaho Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. Loss of the support, including economic support, maintenance, guidance and assistance of Plaintiffs' decedent, Maria A. Aguilar;

2. Medical expenses and funeral expenses;
3. With regard to Plaintiff, Jose Aguilar, for the loss of the services, comfort, care, society, and companionship of his wife, Maria A. Aguilar;
4. With regard to Plaintiffs, Jose Aguilar Jr., Guadalupe Maria Aguilar, [REDACTED] Aguilar and [REDACTED] Aguilar, for the loss of the services, comfort, care, society, and companionship of their mother, Maria A. Aguilar.
5. For reasonable attorneys' fees and costs of suit; and
6. For such other and further damages as may be given under all the circumstances of the case as may be just.

RESPECTFULLY SUBMITTED This ____ day of September 2006.

COMSTOCK AND BUSH

David E. Comstock, Of the Firm
Attorneys for Plaintiffs

Byron V. Foster
Attorney for Plaintiffs

ORIGINAL

David E. Comstock
LAW OFFICES OF COMSTOCK & BUSH
199 N. Capitol Blvd., Ste 500
P.O. Box 2774
Boise, Idaho 83701-2774
Telephone: (208) 344-7700
Facsimile: (208) 344-7721
ISB #: 2455

F I L E D
A.M. 1:03 P.M.

SEP 27 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Byron V. Foster
Attorney At Law
199 N. Capitol Blvd., Ste 500
P.O. Box 1584
Boise, Idaho 83701
Telephone: (208) 336-4440
Facsimile: (208) 344-7721
ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal)
Representative of the Estate of Maria A. Aguilar,)
deceased, and as the natural father and)
guardian of GUADALUPE MARIA AGUILAR,)
[REDACTED] AGUILAR, and [REDACTED])
AGUILAR, minors, and JOSE AGUILAR, JR.,)
heirs of Maria A. Aguilar, deceased,)

Case No. CV 05-5781

Plaintiffs,)

NOTICE OF HEARING

v.)

ANDREW CHAI, M.D., STEVEN R. NEWMAN,)
M.D., NATHAN COONROD, M.D., MITCHELL)
LONG, D.O., COLUMBIA WEST VALLEY)
MEDICAL CENTER, an Idaho corporation,)
MERCY MEDICAL CENTER, an Idaho)
corporation, and PRIMARY HEALTH CARE)
CENTER, an Idaho corporation, JOHN and)
JANE DOES I through X, employees of one or)
more of the Defendants,)

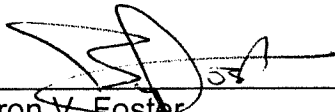
Defendants.)

NOTICE OF HEARING - 1

G:\Aguilar\Pleadings\NOH re mtn to amend.doc

YOU WILL PLEASE TAKE NOTICE That Plaintiffs, by and through their attorneys of record, Comstock & Bush and Byron V. Foster, will bring on for hearing Plaintiff Lynne Royer's Motion in Limine before this court on the 26th day of October, 2006, before the Honorable Gregory M. Culet, District Judge, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 26 day of September, 2006.



Byron V. Foster
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2006, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Andrew C. Brassey, Esq.
Brassey Wetherell Crawford &
McCurdy LLP
203 W. Main St.
Boise, ID 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile (208) 344-7077

Joseph D. McCollum, Jr.
Hawley Troxell Ennis & Hawley LLP
877 W. Main St., Ste. 1000
PO Box 1617
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Raymond D. Powers
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702 West Idaho, Suite 700
Boise, ID 83701

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David R. Lombardi, Esq.
Givens Pursley LLP
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720

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☐ Hand Delivery
☐ Facsimile (208) 388-1300

Gary T. Dance
Moffatt Thomas Barrett Rock &
Fields Chartered
412 W. Center, Suite 2000
PO Box 817
Pocatello ID 83204-0817

☒ U.S. Mail
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☐ Facsimile (208) 232-0150

James B. Lynch
Lynch & Associates, PLLC
1412 W. Idaho Street, Suite 200
PO Box 739
Boise, ID 83701-0739

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile (208) 331-0088



Byron V. Foster

ORIGINAL

David E. Comstock
LAW OFFICES OF COMSTOCK & BUSH
199 N. Capitol Blvd., Ste 500
P.O. Box 2774
Boise, Idaho 83701-2774
Telephone: (208) 344-7700
Facsimile: (208) 344-7721
ISB #: 2455

F I L E D
A.M. 1:30 P.M.

SEP 29 2006

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

Byron V. Foster
Attorney At Law
199 N. Capitol Blvd., Ste 500
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Boise, Idaho 83701
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Facsimile: (208) 344-7721
ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal)
Representative of the Estate of Maria A. Aguilar,)
deceased, and as the natural father and)
guardian of GUADALUPE MARIA AGUILAR,)
██████████ AGUILAR, and ██████████)
AGUILAR, minors, and JOSE AGUILAR, JR.,)
heirs of Maria A. Aguilar, deceased,)

Case No. CV 05-5781

Plaintiffs,)

**NOTICE OF SERVICE OF
DISCOVERY DOCUMENTS**

v.)

ANDREW CHAI, M.D., STEVEN R. NEWMAN,)
M.D., NATHAN COONROD, M.D., MITCHELL)
LONG, D.O., COLUMBIA WEST VALLEY)
MEDICAL CENTER, an Idaho corporation,)
MERCY MEDICAL CENTER, an Idaho)
corporation, and PRIMARY HEALTH CARE)
CENTER, an Idaho corporation, JOHN and)
JANE DOES I through X, employees of one or)
more of the Defendants,)

Defendants.)

NOTICE IS HEREBY GIVEN that on the 27 day of September, 2006, a copy of *Plaintiffs' Supplemental Answers and Responses to Defendant WVMC's First Set of Interrogatories and Request for Production of Documents* were served by the following method, to:

Andrew C. Brassey, Esq.
Brassey Wetherell Crawford &
McCurdy LLP
203 W. Main St.
Boise, ID 83702

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☐ Hand Delivery
☐ Facsimile (208) 344-7077

Joseph D. McCollum, Jr.
Hawley Troxell Ennis & Hawley LLP
877 W. Main St., Ste. 1000
PO Box 1617
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Hall Farley Oberrecht & Blanton
Ray Powers
702 W. Idaho, Ste. 700
PO Box 1271
Boise, ID 83701

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☐ Facsimile (208) 395-8585

David R. Lombardi, Esq.
Givens Pursley LLP
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720

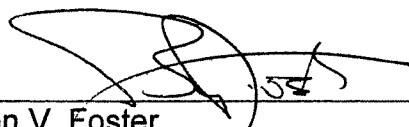
☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile

James B. Lynch
Lynch & Associates PLLC
1412 W. Idaho, Ste. 200
P.O. Box 739
Boise, ID 83701-0739

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile

Gary T. Dance
Moffatt Thomas Barrett Rick & Fields
Chartered
412 W. Center, Suite 2000
PO Box 817
Pocatello ID 83204-0817

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile (208) 208-232-0150


Byron V. Foster
Attorney for Plaintiffs

ORIGINAL

David E. Comstock
LAW OFFICES OF COMSTOCK & BUSH
199 N. Capitol Blvd., Ste 500
P.O. Box 2774
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Facsimile: (208) 344-7721
ISB #: 2455

Byron V. Foster
Attorney At Law
199 N. Capitol Blvd., Ste 500
P.O. Box 1584
Boise, Idaho 83701
Telephone: (208) 336-4440
Facsimile: (208) 344-7721
ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO FOR THE COUNTY OF CANYON COUNTY

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A. Aguilar,
deceased, and as the natural father and
guardian of GUADALUPE MARIA AGUILAR,
[REDACTED] AGUILAR, and [REDACTED]
AGUILAR, minors, and JOSE AGUILAR, JR.,
heirs of Maria A. Aguilar, deceased,

Plaintiffs,

v.

ANDREW CHAI, M.D., STEVEN R. NEWMAN,
M.D., NATHAN COONROD, M.D., MITCHELL
LONG, D.O., COLUMBIA WEST VALLEY
MEDICAL CENTER, an Idaho corporation,
MERCY MEDICAL CENTER, an Idaho
corporation, and PRIMARY HEALTH CARE
CENTER, an Idaho corporation, JOHN and
JANE DOES I through X, employees of one or
more of the Defendants,

Defendants.

FILED
1100 A.M. P.M.

OCT 06 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Case No. CV 05-5781

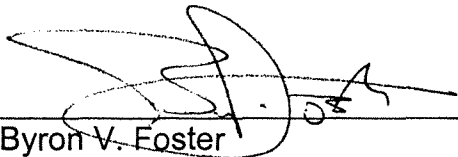
AMENDED NOTICE OF
HEARING

AMENDED NOTICE OF HEARING - 1

G:\Aguilar\Pleadings\NOH Amended re mtn to amend.doc

YOU WILL PLEASE TAKE NOTICE That Plaintiffs, by and through their attorneys of record, Comstock & Bush and Byron V. Foster, will bring on for hearing Plaintiffs' Motion to Amend Complaint before this court on the 20th day of November, 2006, before the Honorable Gregory M. Culet, District Judge, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 4 day of October, 2006.


Byron V. Foster
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of October, 2006, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Andrew C. Brassey, Esq.
Brassey Wetherell Crawford &
McCurdy LLP
203 W. Main St.
Boise, ID 83702

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile (208) 344-7077

Joseph D. McCollum, Jr.
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877 W. Main St., Ste. 1000
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702 West Idaho, Suite 700
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David R. Lombardi, Esq.
Givens Pursley LLP
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720


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Fields Chartered
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Pocatello ID 83204-0817

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1412 W. Idaho Street, Suite 200
PO Box 739
Boise, ID 83701-0739

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile (208) 331-0088


Byron V. Foster

ORIGINAL

Andrew C. Brassey (ISB No. 2128)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
P.O. Box 1009
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Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Defendant Andrew Chai, M.D.

FILED
A.M. 10 P.M.

OCT 30 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of Maria
A. Aguilar, deceased, and as the natural father
and guardian of GUADALUPE MARIA
AGUILAR, [REDACTED] AGUILAR, and
[REDACTED] AGUILAR, minors, and JOSE
AGUILAR, JR., heirs of Maria A. Aguilar,
deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D. NATHAN COONROD,
M.D., CATHERINE ATUP-LEAVITT, M.D.
MITCHELL LONG, D.O., COLUMBIA
WEST VALLEY MEDICAL CENTER, an
Idaho corporation, MERCY MEDICAL
CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an
Idaho corporation, JOHN and JANE DOES I
through X, employees of one or more of the
Defendants,

Defendants.

Case No. CV05-5781

NOTICE OF SERVICE

NOTICE IS HEREBY GIVEN that on the 26th day of October 2006 DEFENDANT ANDREW CHAI, M.D.'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS and DEFENDANT ANDREW CHAI, M.D.'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS, together with a copy of this *Notice of Service*, were served upon:

David E. Comstock
LAW OFFICES OF COMSTOCK & BUSH
199 North Capitol Boulevard, Suite 500
P.O. Box 2774
Boise, Idaho 83701-2774

Byron V. Foster
Attorney at Law
199 North Capitol Boulevard, Suite 500
P.O. Box 1584
Boise, Idaho 83701

Gary T. Dance
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
412 West Center, Suite 2000
P.O. Box 817
Pocatello, Idaho 83204-0817

Joseph D. McCollum, Jr.
HAWLEY TROXELL ENNIS & HAWLEY
877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617

Raymond D. Powers
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, Idaho 83701

David R. Lombardi
GIVENS PURSLEY, LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720

James B. Lynch
LYNCH & ASSOCIATES, PLLC
1412 West Idaho Street, Suite 200
P.O. Box 739
Boise, Idaho 83701-0739

by depositing the same in the United States mail, postage prepaid, in envelopes addressed to said attorneys at their last known addresses set forth above.

DATED this 26th day of October, 2006.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By Andrew C. Brassey
Andrew C. Brassey, Of the Firm
Attorneys for Defendant Andrew Chai, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2006, I served a true and correct copy of the foregoing NOTICE OF SERVICE upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

| | | |
|--|-------------------------------------|----------------------------|
| David E. Comstock | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| LAW OFFICES OF COMSTOCK & | <input type="checkbox"/> | Hand-Delivered |
| BUSH | <input type="checkbox"/> | Overnight Mail |
| 199 North Capitol Boulevard, Suite 500 | <input type="checkbox"/> | Facsimile (208) 344-7721 |
| P.O. Box 2774 | | |
| Boise, Idaho 83701-2774 | | |
| Byron V. Foster | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| Attorney at Law | <input type="checkbox"/> | Hand-Delivered |
| 199 North Capitol Boulevard, Suite 500 | <input type="checkbox"/> | Overnight Mail |
| P.O. Box 1584 | <input type="checkbox"/> | Facsimile (208) 344-7721 |
| Boise, Idaho 83701 | | |
| Gary T. Dance | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| MOFFATT, THOMAS, BARRETT, | <input type="checkbox"/> | Hand-Delivered |
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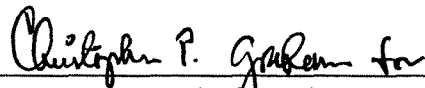
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Attorneys for Defendant Mercy Medical Center

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CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the Personal
Representative of the Estate of Maria A.
Aguilar, deceased, and as the natural father and
guardian of GUADALUPE MARIA
AGUILAR, [REDACTED] AGUILAR, and
[REDACTED] AGUILAR, minors, and JOSE
AGUILAR, JR., heirs of Maria A. Aguilar,
deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., CATHERINE ATUP-LEAVITT, M.D.,
MITCHELL LONG, D.O., COLUMBIA
WEST VALLEY MEDICAL CENTER, an
Idaho corporation, MERCY MEDICAL
CENTER, an Idaho corporation, and
PRIMARY HEALTH CARE CENTER, an
Idaho corporation, JOHN and JANE DOES I
through X, employees of one or more of the
Defendants,

Defendants.

CASE NO.: CV 05-5781

**MERCY MEDICAL CENTER'S
RESPONSE TO PLAINTIFFS'
MOTION FOR LEAVE TO
AMEND COMPLAINT**

COMES NOW Mercy Medical Center (“Mercy”) and responds to Plaintiffs’ Motion for Leave to Amend Complaint.

I. INTRODUCTION

Plaintiffs’ proposed Amended Complaint attempts to “more specifically set forth allegations of agency and non-delegable duty against Defendants.” The Court should deny Plaintiffs’ Motion because the expanded causes of action asserted against Mercy in the proposed Amended Complaint do not exist in Idaho and, therefore, the proposed amendments fail to state a valid claim and are futile.

II. BACKGROUND

In this medical malpractice case, Plaintiffs allege Maria A. Aguilar sought care from the Defendants at various times, and the Defendants failed to diagnose developing pulmonary emboli, which eventually lead to Mrs. Aguilar’s death. Complaint and Demand for Jury Trial (“Complaint”) at ¶ 16. Plaintiffs allege Mercy is liable to Plaintiffs under the doctrines of Respondeat Superior and corporate negligence. Complaint at Counts VIII and IX. In their corporate negligence claim, Plaintiffs allege Mercy had a:

- a. A duty to use reasonable care in the maintenance of safe and adequate facilities;
- b. A duty to select and retain only competent physicians, nurses, and related personnel;
- c. A duty to oversee all who practice medicine within its walls as to patient care and safety; and
- d. A duty to formulate, adopt, and enforce necessary policies, procedures, and protocols for the use of nursing staff, physicians, and others providing guidance and instruction as respects the appropriate course of response or conduct in the face of circumstances such as that presented by Plaintiffs’ decedent, Maria A. Aguilar.

Plaintiffs filed their Motion for Leave to Amend Complaint to More Specifically Set Forth Allegations of Agency and Non-Delegable Duty Against Defendants West Valley Medical Center, Mercy Medical Center, and Primary Health Care Center (“Plaintiffs’ Motion to Amend”) on September 26, 2006. The purpose of Plaintiffs’ Motion to Amend is “to set forth a more definite statement of Plaintiffs’ theories of vicarious liability and non-delegable duty against the aforementioned Defendant Hospitals and Primary Health.” In their proposed Amended Complaint, Plaintiffs expand their allegations against Mercy relating to their Respondeat Superior claim. Plaintiffs allege that Mercy is responsible for the actions of Defendant Mitchell Long, D.O. under “Idaho Code § 39-101, et seq; Idaho Code § 39-1201(a) and IDAPA 16.03.14, et seq, . . . as an emergency room physician providing emergency services at Defendant Mercy Medical Center.” See Affidavit of Byron V. Foster In Support of Plaintiffs’ Motion for Leave to Amend Complaint at Exhibit A, Amended Complaint and Demand for Jury Trial (“Proposed Amended Complaint”) at ¶ 37.

III. ANALYSIS

A. Legal Standard.

Under Rule 15(a), after a responsive pleading has been served, “a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...” The Idaho Supreme Court has held that Rule 15(a) provides the trial court with discretion to grant or deny a motion seeking leave to amend. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 132 Idaho 318, 324, 971 P.2d 1142, 1148 (1998). The trial Court does not abuse “its discretion in denying a request for leave to amend a complaint if the new claims proposed to be inserted fail to state a valid claim.” *Id.* at 319, 971 P.2d at 1149 *citing*

Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

B. In Idaho, A Hospital Cannot Be Held Liable Under the Theory of Respondeat Superior for the Actions of an Independent Physician.

With their non-delegable duty theory, Plaintiffs ask the Court to find that each hospital in this state is the guarantor of, and vicariously liable for, the act of any independent contractor physician practicing within the hospital's walls. Such a ruling will have the effect of inducing plaintiffs to make hospitals defendants in every medical malpractice case involving physician care at a hospital. Such a claim will occur regardless of whether the hospital and its nurses and other employees provided excellent care, regardless of whether the hospital took reasonable steps to ensure the physician was qualified and competent before granting the physician privileges, and regardless of whether the hospital engaged in appropriate quality assurance processes to ensure only qualified physicians' privileges were renewed.

An informed reading of the pertinent regulations shows these regulations do not support the imposition of vicarious liability upon a hospital for an independent physicians' conduct, and they do not support Plaintiffs' non-delegable duty or agency claims here.

1. IDAPA 16.03.14 is merely a licensing statute that should not be applied to impose tort liability.

The Plaintiffs seek to use hospital regulations to impose tort liability on Mercy. The Idaho Administrative Procedure Act ("IDAPA") regulations upon which Plaintiffs' rely are licensing regulations. These IDAPAs do not provide for a private cause of action or private right of enforcement. A review of the regulations at issue clearly demonstrates they were not intended to impose, and do not impose, tort liability on hospitals, and do

not establish, contrary to I.C. § 39-1353(a), that hospitals have any authority or ability to practice medicine.

The Idaho Department of Health and Welfare is the state administrative agency responsible for hospital licensing under the Hospital Licenses and Inspection Act, Idaho Code §§ 39-1301 – 39-1314. In furtherance of its licensing duties, the Department has promulgated, and interprets and enforces, the Rules and Minimum Standards for Hospitals in Idaho, IDAPA 16.03.14 et. seq. See Idaho Code § 39-1307. The purpose of these regulations is to promote uniformity and minimum standards for construction, maintenance, operation and treatment of patients in Idaho hospitals by the establishment of licensing requirements. See Idaho Code § 39-1302.

Because the sole purpose of the regulations at IDAPA 16.03.14 is to govern the licensure of hospitals, as stated above, the regulations begin, after defining key terms in IDAPA 16.03.14.002, by establishing the basic requirement that all hospitals (as defined by IDAPA 16.03.14.16) must be licensed and by providing a process for applications, issuance, denial, and revocation of hospital licenses. These provisions are contained in IDAPA 16.03.14.100 – 150.

After establishing the requirement and process for hospital licensure, the remaining provisions of IDAPA 16.03.14 establish the minimum requirements which must be satisfied in order to obtain and maintain licensure as a hospital (IDAPA 16.03.14.310 through IDAPA 360); requirements for optional services (e.g., emergency service, surgical service, anesthesia service, maternity, etc.); requirements for facilities (IDAPA 16.03.14.500); fire safety (IDAPA 16.03.14.510); disaster plans (IDAPA 16.03.14.520); maintenance and safety (IDAPA 16.03.14.530); patient accommodations

(IDAPA 16.03.14.531); infection control (IDAPA 16.03.14.540); environmental sanitation (IDAPA 16.03.14.550); and construction and miscellaneous standards and provisions (IDAPA 16.03.14.600 – 999).

The two most fundamental requirements for hospital licensure are contained in IDAPA 16.03.14.200 and IDAPA 16.03.14.250. These provisions outline the minimum requirements for administrative and medical governance of Idaho hospitals. No Idaho hospital can be licensed without fulfilling the requirements of these two related, but independent provisions of the regulations.

The requirements for administrative governance of Idaho hospitals are contained in IDAPA 16.03.14.200. This section, which is entitled “Governing Body and Administration,” states that a hospital must have “an organized governing body, or equivalent, that has ultimate authority and responsibility for the operation of the hospital.” This responsibility includes the responsibility to provide basic administration services including personnel policies (IDAPA 16.03.14.200.03.a); regularly scheduled and documented departmental meetings (IDAPA 16.03.14.200.03.c); discharge planning (IDAPA 16.03.14.200.04); institutional planning (IDAPA 16.03.14.200.05), compliance with laws and regulations (IDAPA 16.03.14.200.07); and quality assurance (IDAPA 16.03.14.200.10).

Because Idaho is a predominantly rural state, it was necessary for the Department to draft the IDAPA 16.03.14.200 in a fashion which would permit compliance by hospitals in rural communities such as Council, Preston or Cascade as well as larger communities like Boise, Coeur D’Alene or Pocatello. To accommodate this diversity of

available resources, the regulations allow a hospital to contract for the provisions of administrative services required by IDAPA 16.03.14.200.

IDAPA 16.03.14.200.08, which is entitled “Use of Outside Resources”, is specifically designed and drafted to permit a hospital, particularly rural hospitals with limited resources, to contract for the provision of the administrative services required by IDAPA 16.03.14.200. That section provides:

08. Use of Outside Resources. If a hospital does not employ a required professional person to render a specific service, there shall be a written agreement for such service to meet the requirements of these rules. The agreement shall specify the following:

- a. Responsibilities of both parties, with the hospital retaining responsibility for services rendered.
- b. All services to be performed by outside resources including reports, frequency of visits and services rendered.

The use of contractual administrative services to meet the requirements of IDAPA 16.03.14.200 is acknowledged and accepted by the Department for licensure purposes pursuant to this section.

IDAPA 16.03.14.200.08 does not concern the provision of medical care by hospital Medical Staff. IDAPA 16.03.14.200.08 concerns hospital administrative services. The applicability of IDAPA 16.03.14.200.08 solely to the provision of administrative services is evidenced by the use of the term “required professional person” rather than “Physician” as defined in IDAPA 16.03.14.002.14. It is further evidenced by the clear reference to “outside resources” and the requirement for a written agreement concerning “frequency of visits”.

IDAPA 16.03.14.200.08 requires that all contractual arrangements for the provision of administrative services by “outside resources” be documented by written

agreement between the hospital and the provider of those contracted administrative services. IDAPA 16.03.14.200.08 also makes it clear, by stating in IDAPA 16.03.14.200.8.b. “with the hospital retaining responsibility for services rendered”, that obtaining the administrative services required by IDAPA 16.03.14.200 by the use of contracted “outside resources” does not excuse a hospital from the requirement to have proper administrative service in place. In other words, non-performance by an “outside resource” who contracted to provide, but failed to provide the administrative services required by IDAPA 16.03.14.200 does not excuse the contracting hospital from its obligation to comply with IDAPA 16.03.14.200 or provide a defense to any sanction or license revocation proceeding arising out of its failure to have proper administrative services.

The requirements for medical governance of Idaho hospitals are contained in IDAPA 16.03.14.250. This section, which is entitled “Medical Staff,” states that a hospital must have “an active medical staff organized under bylaws approved by the governing body and responsible to the governing body for the quality of all medical care provided the patients...”. This responsibility includes, but is not limited to, the responsibility to ensure the qualifications of members of the medical staff (IDAPA 16.03.14.250.01) and to review the clinical work of the medical staff (IDAPA 16.03.14.250.03.f).

“Medical Staff Members” are defined in IDAPA 16.03.14.002.27 as, “Those licensed physicians, dentists, podiatrists and other professionals granted the privilege to practice in the hospital by the governing authority of a hospital.” The existence of a Medical Staff is a required part of a licensed hospital pursuant to IDAPA 16.03.14.250.

Members of the Medical Staff who are practicing medicine within the scope of their hospital privileges are not “outside resources” as used in IDAPA 16.03.14.200.8.

The provisions of IDAPA 16.03.14 et seq. are intended only to govern the licensing of Idaho hospitals. They are not intended, nor has the Department ever interpreted them, to establish any respondeat superior relationship that would render a hospital liable for the negligent treatment of a hospital patient by a physician member of the medical staff.

2. IDAPA 16.03.14.370 does not create an individual cause of action.

IDAPA 16.03.14.370.02 focuses a hospital’s requirements for emergency care and states:

02. Staffing. There shall be adequate medical and nursing personnel to care for patients arriving at the emergency room. Minimum personnel and qualifications of such personnel shall be as follows:

- a. A physician in the hospital or on call twenty-four (24) hours a day and available to see emergency patients as needed.
- b. A qualified registered nurse shall be on duty in the facility and available to the emergency room at all times.

As examined above, this section is found in the context of hospital administrative regulations and cannot be used to assign respondeat superior liability to a hospital. It does not, nor is it intended to, create liability in a hospital for the acts of an independent health care provider.

3. IDAPA 16.03.14.200.370 and 16.03.14.200.8 are ambiguous and imposing liability based upon them would violate due process.

Though the hospital licensing regulations clearly do not impose liability on Saint Alphonsus for, or, make it a guarantor for the acts of an independent physician regardless of the hospital’s fault, Plaintiff’s analysis is further flawed. The key terms in Plaintiffs’ regulatory respondeat superior analysis – “retaining responsibility” and “adequate

medical and nursing personnel” are vague, ambiguous, and cannot be enforced without violating commonly accepted principles of statutory construction and constitutional principles of due process. (See e.g. *Haw v Idaho State Board of Medicine*, 140 Idaho 152, 90 P.3d 902 (2004)).

C. Idaho Trial Courts Have Rejected the Theory of Vicarious Liability Plaintiffs Assert.

Plaintiffs attempt to use an Amended Complaint to elaborate their theories of vicariously liable against Mercy. Idaho trial courts have specifically reject the theories of liability Plaintiffs espouse in their Proposed Amended Complaint. At least two Fourth Judicial District judges, Judge Sticklen and Judge Copsey, have rejected similar vicarious liability theories. Analysis of Judge Sticklen’s and Judge Copsey’s decisions on these issues is instructive. True and correct copies of Judge Sticklen’s and Judge Copsey’s decisions on this issue are attached hereto as Exhibits “A” and “B” respectively for the Court’s review.

In *Henrickson v. Saint Alphonsus Medical Center, et al.*, Fourth District Case No. CV-OC 0304896D, Judge Sticklen rejected the Henricksons’ theory the Idaho Administrative Procedure Act (“IDAPA”) somehow made Saint Alphonsus responsible for the actions of an independent physician practicing in its facility and granted Saint Alphonsus summary judgment on this claim. Henrickson was a medical malpractice case involving placement of a central venous catheter. The Henricksons alleged Dr. Smagula negligently placed a venous catheter in Mr. Henrickson’s right carotoid artery, which caused Mr. Henrickson to have a stroke. Memorandum Decision and Order, *Henrickson v. Saint Alphonsus*, CV-OC 0304896, at p. 2. The Henricksons conceded they had no proof of any independent negligence by Saint Alphonsus nurses or employees. *Id.*

Dr. Smagula was an independent physician and was not employed by Saint Alphonsus. *Id.* at 5. The Henricksons asserted that under IDAPA 16.03.14.2, however, Saint Alphonsus retained responsibility for the actions of independent physicians practicing in its facility. *Id.* Saint Alphonsus responded (as analyzed above in this Memorandum) that IDAPA 16.03.14.200.08 only applies to administrative services not to medical care given at the hospital and the IDAPA provisions at issue were only intended to govern hospital licensing in Idaho and were not intended to, and should not therefore, establish any respondeat superior liability in the hospital. *Id.* at 6.

Judge Sticklen agreed with Saint Alphonsus' analysis after she examined the regulations' context and language. Judge Sticklen noted Idaho Code section 39-1301 et seq., under which IDAPA 16.03.14.200 is promulgated, are provisions guiding the Idaho Department of Health and Welfare regarding the licensing of hospitals. *Id.* The IDAPAs at issue "created rules and standards related to the licensing of hospitals in Idaho." *Id.* at 7. Judge Sticklen found such administrative rules regarding hospital licensing did not create any respondeat superior liability in the hospital for an independent physician's negligence. *Id.* In so holding, Judge Sticklen specifically rejected the analysis of Judge Newhouse, who had previously found these IDAPA provisions could give rise to respondeat superior liability in a hospital for an independent physician's negligence. Judge Sticklen also examined and dismissed the Henricksons' agency claims.

More recently, in *Harrison v. Hartford, et al.*, Fourth District Case No. CVPI0400163D, Judge Copsey denied the Plaintiffs' motion to amend their Complaint to add a claim for negligent credentialing against Defendant Saint Alphonsus Medical Center. *See Order Denying Motions To Amend RE: St. Alphonsus and Granting Motion*

to Amend RE: Dr. Hartford, *Harrison v. Hartford, et al.*, CVPI0400163D, at p. 20. In reaching her conclusion, Judge Copsey engaged in an in-depth analysis of Idaho Code section 39-1392c's Peer Review Immunity and caselaw cited by both parties regarding negligent credentialing claims. Judge Copsey rejected the Harrison's "nonsensical" and "strained interpretation" of the statute, which would "place this Court in the untenable position of granting St. Alphonsus immunity for reading [peer review material] but simultaneously holding St. Alphonsus liable for using the contents read by the committee in the material when granting or denying credentials." *Id.* at 8.

Harrison was a medical malpractice case in which the Harrisons alleged St. Alphonsus, Dr. Hartford and Dr. Binnion were negligent in their care and treatment of Mr. Harrison for hyponatremia (sodium deficiency). The Harrisons sought to amend their Complaint to allege Saint Alphonsus was negligent in credentialing Dr. Hartford because there was evidence Dr. Hartford had a history of drug and alcohol abuse, which could affect his care of patients.

Judge Copsey found Idaho Code section 39-1392 et seq. "clearly makes the *act of credentialing* a peer review activity subject to immunity." *Id.* at 8. Judge Copsey engaged in extensive analysis of other jurisdictions' peer review statutes and the caselaw interpreting them. *Id.* at pp. 10-20. Ultimately, she found the Idaho Peer Review Statute to be unique in its expansive scope and the fact the Idaho Constitution allows the abrogation of common law causes of action. *Id.* at p. 17. She rejected the Harrisons' reliance on caselaw from other jurisdictions recognizing a cause of action for negligent credentialing and denied their motion to amend because a cause of action for negligent credentialing does not exist in Idaho. *Id.* at 20; *See also* Benjamin J. Vernia, Tort Claims

for Negligent Credentialing of Physician, 98 A.L.R.5th 533 (2002) (compiling and annotating caselaw regarding negligent credentialing).

While Plaintiffs do not appear to specifically assert a cause of action for negligent credentialing against Mercy in the current case, Judge Copsey's rationale for denying the Harrisons' motion to amend is applicable. If there is no valid cause of action, an amendment is futile and should not be allowed.

D. Mitchell Long, D.O. Was Not Mercy's Agent.

It is undisputed Mitchell Long, D.O. was not Mercy's actual agent. The issue then is whether Mitchell Long, D.O. was Mercy's ostensible or apparent agent. No Idaho appellate court has ever applied the ostensible or apparent agency doctrine to hold an ostensible principal liable for injuries resulting from an apparent agent's tortious conduct. This is because the doctrine of ostensible agency "arose in the arena of contract law and addresses circumstances in which an agent, acting without actual authority, may nonetheless bind the principal to a contract entered into by the agent with a third party." *Landvik v. Herbert*, 130 Idaho 54, 59, 936 P.2d 697, 702 (Ct.App. 1997). This Court should reject the Plaintiffs' invitation to expand traditional Idaho tort law by ruling, as a matter of law, that a plaintiff cannot use the ostensible agency doctrine to impose vicarious liability on a principal for the negligence of an ostensible agent.

"Apparent authority is created when the principal 'voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority.'" *Landvik*, 130 Idaho at 59, 936 P.2d at 702. It "differs from express and implied authority in that it is not based on the words and conduct of the principal toward the agent, but on the principal's words and conduct toward a third party.

Consequently, apparent authority cannot arise from the acts and statements of the agent alone; it must be based upon the principal's words and conduct.” *Id.* According to the Idaho Court of Appeals, *if* Idaho law allowed plaintiffs to use the doctrine of apparent authority to create tort liability on the part of a principal, then a plaintiff attempting to create such liability would have to prove: (1) the *principal's conduct* gave rise to an apparent or ostensible agency; and (2) the plaintiff's injury resulted from the *plaintiff's reliance* upon the apparent authority of the agent. *Landvik*, 130 Idaho at 59-60; 936 P.2d 703-04 (affirming summary judgment for defendant on apparent agency claim where, even assuming Idaho would recognize apparent agency theory in a negligence case, the plaintiff, who was injured while stage-diving at a concert, had failed to introduce any evidence upon which a jury could reasonably find that the plaintiff relied upon alleged agent's apparent authority in deciding to attend the concert).

Plaintiffs have not asserted any facts that would bring the doctrines of ostensible or apparent agency in to play in this lawsuit.

E. This Court Should Follow The Rationale of *Henrickson* and *Harrison* and Deny Plaintiffs' Motion to Amend.

The only basis Plaintiffs provide for their Motion to Amend is “to set forth a more definite statement of Plaintiffs’ theories of vicarious liability and non-delegable duty against the aforementioned Defendant Hospitals and Primary Health.” Plaintiffs’ Motion to Amend at p. 2. Idaho law does not recognize theories of liability asserted in Plaintiffs’ Proposed Amended Complaint, and Plaintiffs have no legal basis for asserting these causes of action against Mercy. Therefore, there is no purpose in allowing Plaintiffs to amend their Complaint; the proposed amendment merely elaborates a non-existent cause

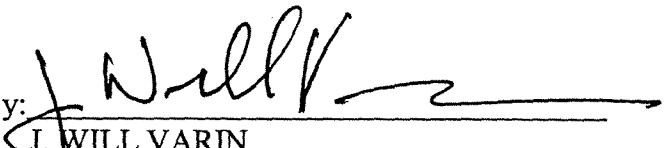
of action. This Court should adopt Judge Copsey's analysis in *Harrison* and deny the Plaintiffs' Motion to Amend.

IV. CONCLUSION

Because Mercy cannot be held vicariously liable for any physician Defendant's alleged negligence and the proposed amendments serve no purpose but to elaborate a non-existent cause of action, the Court should deny the Plaintiffs' Motion to Amend.

DATED this 13th day of November, 2006.

GIVENS PURSLEY LLP

By: 
J. WILL VARIN
Attorneys for Mercy Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2006, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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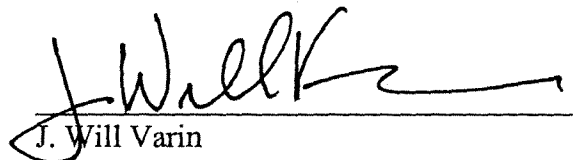
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J. Will Varin

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J. DAVID NAVARRO, Clerk
BY *[Signature]* DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES L. HENRICKSON and
MILDRED HENRICKSON, husband and
wife,

Plaintiff,

vs.

SAINT ALPHONSUS REGIONAL
MEDICAL CENTER, Inc., an Idaho non-
profit corporation; CARL M. SMAGULA,
M.D., and JOHN DOES I through X,

Defendants.

Case No. CV-OC 0304896D

MEMORANDUM DECISION
AND ORDER

This case is before the Court on Defendant St. Alphonsus Regional Medical Center's (St. Alphonsus') motion for summary judgment and motion to strike, St. Alphonsus and Defendant Carl M. Smagula, M.D.'s (Dr. Smagula's) motion to exclude expert witnesses, and Plaintiffs (the Henricksons) motion to compel discovery responses. For the reasons that follow, the motion for summary judgment is granted, the motion to strike is denied in part and granted in part, the motion to exclude expert witnesses is denied, and the motion to compel is denied.

FACTS AND PROCEDURAL HISTORY

This is a medical malpractice case involving the placement of a central venous catheter. The Henricksons allege that Dr. Smagula, an anesthesiologist, negligently placed the catheter not

1 in Mr. Henrickson's jugular vein, but in the right carotid artery, which resulted in a stroke in
2 September 2001. Mr. Henrickson was a patient at St. Alphonsus when that alleged negligence
3 occurred. The Henricksons filed this suit on June 25, 2003. St. Alphonsus now brings this motion
4 for summary judgment, requesting that the Court dismiss the Henricksons' claim that St.
5 Alphonsus is liable for Dr. Smagula's alleged negligence. The Henricksons have conceded that
6 they have no proof of any negligence by the hospital's nurses or other employees. Also, St.
7 Alphonsus and Dr. Smagula move to exclude some of the Henricksons' expert witnesses, and the
8 Henricksons move to compel discovery responses.
9

10 ANALYSIS

11 1. Motion for Summary Judgment and Motion to Strike

12 (a) Standard.

13 Affidavits submitted in support of and in opposition to motions for summary judgment
14 must be made on personal knowledge, set forth facts that would be admissible at trial on the issue
15 addressed, and demonstrate that the affiant is competent to testify to the matters stated. See Rule
16 56(e), I.R.C.P. When challenges are made to the sufficiency of affidavits, rulings on such
17 challenges should be made before a summary judgment motion is decided. See *State v. Shama*
18 *Resources Ltd. Partnership*, 127 Idaho 267, 899 P.2d 977 (1995).
19

20 Summary judgment is appropriate only if the affidavits, depositions, admissions and other
21 evidence in the record demonstrate that there are no genuine issues of material fact and that the
22 moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); see also *Hines v. Hines*,
23 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court
24 "liberally construes the record in a light most favorable to the party opposing the motion and draws
25

1 all reasonable inferences and conclusions in that party's favor." *Brooks v. Logan*, 130 Idaho 574,
2 576, 944 P.2d 709, 711 (1997).

3 (b) Motions to Strike.

4 (1) Judicial Notice

5 St. Alphonsus asks the Court to strike footnote twenty-two in the Henricksons'
6 memorandum in opposition to St. Alphonsus motion for summary judgment. In the opposition,
7 the Henricksons assert that under the doctrine of apparent or ostensible agency, they relied on the
8 fact that St. Alphonsus "holds itself out to the public as a provider of care." The footnote reads:

9 See St. Alphonsus' web site at <http://www.saintalphonsus.org> for a description of services
10 provided by the medical center and, especially, the representation of its "Centers of
11 Excellence." The Henricksons hereby request the Court take judicial notice of St.
Alphonsus' marketing activities pursuant to I.R.E. 201.

12 St. Alphonsus asserts that the footnote is irrelevant because it is unknown whether the Henricksons
13 viewed the website or relied on it in choosing medical care.

14
15 I.R.E. 201 provides that a court in its discretion may take judicial notice of adjudicative
16 facts. A judicially noticed fact must not be subject to reasonable dispute in that it is either "(1)
17 generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and
18 ready determination by resort to sources whose accuracy cannot reasonably be questioned." I.R.E.
19 201(b). In addition, Black's Dictionary explains that judicial notice occurs when the court
20 recognizes the existence and truth of certain facts that have a bearing on the controversy. Such
21 facts are "universally regarded as established by common notoriety." See BLACK'S LAW
22 DICTIONARY 592 (6th ed. 1991).

23
24 The Court will not take judicial notice of St. Alphonsus' marketing activities. St.
25 Alphonsus has not disputed that it is a provider of public care. Further, its advertising activities
26

1 are not the kinds of adjudicative facts referred to in Rule 201. For these reasons, this portion of St.
2 Alphonsus' motion to strike is granted.

3 (2) Affidavits.

4 St. Alphonsus also requests that the Court strike paragraph five of the Henrickson's
5 affidavits wherein the Henrickson's assert that they relied on St. Alphonsus for all of the care
6 provided during Mr. Henrickson's stay from July 28, 2001 until October 2, 2001. St. Alphonsus
7 argues that this assertion is inadmissible because it is a mere conclusion and does not set forth
8 specific facts showing genuine issues for trial. The Court finds that this assertion is admissible
9 because it is the Henrickson's belief and opinion that they relied on St. Alphonsus for all care
10 during Mr. Henrickson's stay. Such an assertion is specific and draws the conclusion that the
11 Henrickson's relied on the hospital for all care rendered. It is appropriate lay opinion under Ule
12 701, I.R.E. Accordingly, this portion of St. Alphonsus' motion to strike is denied.

13
14 (c) Summary Judgment.

15 The Henricksons claim that St. Alphonsus is vicariously liable for Dr. Smagula's acts. In
16 the motion for summary judgment, St. Alphonsus asserts that it is not liable for any alleged
17 negligence based on a respondeat superior relationship and that the Henricksons fail to establish
18 that Dr. Smagula is an actual or ostensible agent of St. Alphonsus.

19
20 (1) Duty Imposed by IDAPA

21 At issue are certain regulations of the Idaho Administrative Code, particularly the Idaho
22 Department of Health and Welfare's standards for hospitals in Idaho. Under these rules, hospitals
23 are to provide anesthesia services if the hospital provides surgery or obstetrical services with C-
24 Section capacity. See IDAPA 16.03.14.390. All policies and procedures for anesthesia services
25

1 must be approved by the medical staff and hospital's administration. IDAPA 16.03.14.390.01.

2 Anesthesia services shall be provided under the "overall direction of a physician. The medical
3 staff or appropriate committee shall approve all persons granted anesthesia privileges." IDAPA

4 16.03.13.390.02. "Medical staff" is defined as "licensed physicians ... and other professionals
5 granted the privilege to practice in the hospital by the governing authority of a hospital." IDAPA
6 16.03.14.002.26.

7 St. Alphonsus contracts with Boise Anesthesia, P.A., (Boise Anesthesia) for anesthesia
8 service. St. Alphonsus does not bill for Boise Anesthesia's services; Boise Anesthesia directly
9 bills its patients or their insurance. Because this service is contracted out, the Henricksons believe
10 that IDAPA 16.03.14.200 applies. This rule reads in part:
11

12 08. Use of Outside Resources. If a hospital does not employ a required professional person
13 to render a specific service, there shall be a written agreement for such service to meet the
requirements of these rules. The agreement shall specify the following:

- 14 a. Responsibilities of both parties, with the hospital retaining responsibility for services
15 rendered.
16 b. All services to be performed by outside resources including reports, frequency of visits
and services rendered.

17 Based on this language, the Henricksons claim that St. Alphonsus retains responsibility for
18 the actions of all anesthesiologists practicing at its facility, including Dr. Smagula. In support of
19 this position, the Henricksons cite a Fourth District case in which Hon. Robert G. Newhouse,
20 District Judge (Ret.), determined that St. Alphonsus was liable for the negligent conduct of
21 independent contractors (emergency room physicians). See *Dulaney v. St. Alphonsus Regional*
22 *Medical Center*, Ada County Case No. CVOC-9700686D. Judge Newhouse analyzed IDAPA
23 16.03.14.200.08, and the language: "with the hospital retaining responsibility for services
24
25
26

rendered” in the context of Dulaney’s claim of ostensible authority. Judge Newhouse determined that if the hospital:

elects to provide emergency room service, a physician must be present in the hospital or on call twenty-four (24) hours a day. If the professional does not employ a physician a contract may be entered into, but the regulations still place the responsibility for services rendered with the hospital.

Id. Ultimately, the court found that the “regulations governing the [hospital] do not allow it to contract away liability.” The defendant physicians ultimately obtained summary judgment on the standard of care issue. The case was appealed to the Idaho Supreme Court, but Judge Newhouse’s ruling imposing vicarious liability on St. Alphonsus was never reviewed. *Dulanty v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002).

In response to the Henricksons’ argument, St. Alphonsus asserts that IDAPA 16.03.14.200.08 applies to administrative services and not to medical care given by St. Alphonsus medical staff. St. Alphonsus believes that “responsibility for services rendered” means that non-performance by an “outside resource” who contracted to, but failed to provide, administrative services does not excuse the hospital from its obligation to continue the administrative services. St. Alphonsus also asserts that IDAPA’s provisions were intended to govern only the licensing of hospitals in Idaho and should not establish any respondeat superior relationship that would render a hospital liable for the negligence of independent contracting physicians.

As noted, the Department of Health and Welfare is the state agency responsible for hospital licensing. I.C. §§ 39-1301-39-1314 are provisions for hospital licensing and inspection that give the Board of Health and Welfare the authority to adopt, amend and enforce rules that protect the health and safety of patients being cared for in hospitals. The rules at issue are promulgated pursuant to these statutes. The enforcement of such rules by the Board “further[s] the

1 accomplishment of the purposes of this law in promoting safe and adequate treatment of
2 individuals in hospitals ..." I.C. § 39-1307. The Department of Health and Welfare advances
3 these duties via the Idaho Administrative Code, or IDAPA.

4 In reviewing the pertinent sections of IDAPA, it is important to note that principles of
5 "statutory construction apply equally to administrative regulations." *See Parker v. Underwriters*
6 *Laboratories, Inc.*, __ Idaho __, 96 P.3d 618, 621 (2004). If a statute is ambiguous, the court
7 should employ "relevant rules of statutory construction, beginning with the literal words of the
8 statute, giving the language of the statute its plain, obvious, and rational meanings." *Id.*

9
10 Based on the foregoing, the Court concludes that IDAPA 16.03.14.200.08 should not be
11 interpreted as imposing vicarious liability on hospitals for the acts of independent contractors. The
12 Department of Health and Welfare, by way of IDAPA, created rules and standards related to the
13 licensing of hospitals in Idaho. "Licensing" is defined as "the authority in a governmental body to
14 grant a license to pursue a particular activity." *See BLACK'S LAW DICTIONARY* 635 (6th ed.
15 1991). Such a function is administrative in nature and should not be construed as creating a cause
16 of action or tort liability based on a respondeat superior relationship. Accordingly, the Court
17 believes that the rational meaning of IDAPA 16.03.14.200.08 is that the hospital is the party
18 ultimately responsible to provide a service, if the service was contracted to an outside resource and
19 the outside resource no longer provides the service. Consequently, under IDAPA 16.03.14.200.08,
20 St. Alphonsus is not responsible for any alleged negligence resulting from the services rendered by
21 Dr. Smagula.

22
23 (2) Actual Agency

24 The Henricksons assert that an agency relationship is created where one who hires another
25 retains a contractual right to control the other's performance. The Henricksons note that although
26

1 St. Alphonsus does not have a contractual right to control Dr. Smagula's performance, it has a
2 statutory obligation under the IDAPA to "retain responsibility for the services rendered." That
3 argument was dealt with in part (1) above. St. Alphonsus refutes this position by stating that it has
4 no right to tell Dr. Smagula what technique to use in placing a central line, to direct him in what
5 type of anesthesia to use, to tell him how to position the patient, or to dictate how a doctor
6 practices medicine. St. Alphonsus states that it merely engages in quality assurance review of Dr.
7 Smagula's work by requiring incident reports to be filed, review of cases, and other peer review
8 activities as with any other physician.

9
10 In *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 83-84, 14 P.3d 1074, 1077-78
11 (Ct.App.2000), the court held that an employer may be liable for the acts of an employee through
12 the doctrine of respondeat superior if the tort is "committed within the scope of the employee's or
13 servant's employment." *Id.* at 84, 14 P.3d 1074, 1078. Here, Dr. Smagula is not employed by St.
14 Alphonsus but by Boise Anesthesia as an anesthesiologist and partner. Dr. Smagula works at St.
15 Alphonsus via Boise Anesthesia's contract with St. Alphonsus, not an employment contract
16 between St. Alphonsus and Dr. Smagula. Because Dr. Smagula is not St. Alphonsus employee,
17 the Court concludes that St. Alphonsus cannot be held liable for Dr. Smagula's actions under an
18 actual agency theory or respondeat superior theory.

19
20 (3) Ostensible Agency

21 The Henricksons assert that St. Alphonsus is liable because Dr. Smagula is an ostensible
22 agent of the hospital. The Henricksons rely on the RESTATEMENT (SECOND) TORTS § 429 to
23 support this theory. It states:

24 One who employs an independent contractor to perform services for another which are
25 accepted in the reasonable belief that the services are being rendered by the employer or by
26 his servants, is subject to liability for physical harm caused by the negligence of the

contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

The Henricksons also cite *Mejia v. Community Hospital of San Bernadino*, 99 Cal.App.4th 1448, 122 Cal.Rptr.2d. 233 (Ct.App.2002) to explain how ostensible agency works in the hospital setting. Under that case, two elements must be satisfied to find ostensible agency. They include: "(1)conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff." See *Mejia* at 1453, 122 Cal.Rptr.2d. 233, 236. According to the *Mejia* court, the first element is satisfied when the hospital holds itself out to the public as a provider of care. *Id.* Reliance under the second element is established when the plaintiff "looks to the hospital for services, rather than an individual physician ... many courts presume reliance absent evidence that the plaintiff knew or should have known the physician was not an agent of the hospital." *Id.* at 1454, 122 Cal.Rptr.2d 233, 237. Unless a patient has some reason to know of the true relationship between the hospital and the doctor, "-- i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician -- ostensible agency is readily inferred." *Id.* at 1454-55, 122 Cal.Rptr.2d 233, 237.

In response, St. Alphonsus asserts that ostensible agency is applied in Idaho only as a contract doctrine and has never been used to impose vicarious liability on a hospital for physician errors. A review of Idaho case law supports this position. For example, in *Landvik v. Herbert*, 130 Idaho 54, 59, 936 P.2d 697, 702 (Ct.App.1997), the court noted that neither the Idaho Court of Appeals nor the Idaho Supreme Court has "applied the doctrine of apparent authority to a claim that a principal is liable for injuries resulting from the agent's tortious conduct." Although the *Landvik* court did not resolve whether the doctrine of apparent authority may be used to create tort

1 liability, the court found that had it applied the doctrine, there was no evidence that the plaintiff
2 relied on any apparent authority. *Id.* at 60, 936 P.2d 697, 703.

3 Similarly, even if this Court were to apply the apparent authority doctrine, it would not
4 follow the reasoning in *Meija* that a hospital's mere holding itself out to the public as a provider of
5 care, without more, is sufficient to satisfy the requirements of § 429. Idaho law is clear that it
6 must be the principal's words or conduct toward third persons that places the agent in a position to
7 justify a reasonable person in believing that the agent is acting under existing authority. *Landvic*,
8 *supra*. Thus, simply operating as a hospital is not sufficient in and of itself to justify such reliance.

9
10 In this case, there is no admissible evidence that St. Alphonsus led the Henricksons to
11 believe that Dr. Smagula was a hospital employee or agent. From this, the Court concludes that
12 even if Idaho courts had adopted the apparent agency doctrine in tort cases, the Henricksons' claim
13 would fail because they have failed to present any evidence that St. Alphonsus did anything to lead
14 them to a reasonable belief that Dr. Smagula, as an anesthesiologist, acted as an agent of the
15 hospital. Therefore, the Court grants St. Alphonsus motion for summary judgment.

16 (4) Emotional Distress Claims.

17
18 Although neither party addressed this claim in their briefs, they were addressed at oral
19 argument. The Henricksons concede there was no direct evidence of negligent or intentional
20 infliction of emotional distress by St. Alphonsus. Summary judgment on these claims is granted
21 as well.

22
23 **2. Motion to Exclude Expert Testimony**

1 St. Alphonsus and Dr. Smagula ask that the Court preclude the Henricksons from using
2 expert witnesses for whom the Henricksons have not disclosed the underlying facts and data upon
3 which the expert opinions are based.

4 Under Rules 16(i), 26(e)(4) and 37(b)(2) of the Idaho Rules of Civil Procedure, appropriate
5 sanctions for discovery and scheduling violations is a matter of the trial court's discretion. *Priest*
6 *v. Landon*, 135 Idaho 898, 26 P.3d 1235 (2001). Exclusion of testimony is a drastic sanction to be
7 taken only when lesser measures fail. *DeVault v. Herndon*, 107 Idaho 1, 684 P.2d 978 (1984).

8 The Scheduling Order in this case required the Henricksons to disclose their witnesses by
9 June 28, 2004 and to "respond to and/or supplement responses to any discovery requests." Early
10 on in the litigation St. Alphonsus and Dr. Smagula served interrogatories on the Hendricksons
11 asking them to disclose as to each expert witness the substance of the experts opinions and the
12 facts and data upon which such opinions were based. The interrogatories were accompanied by
13 requests for production of documents and other tangible items of evidence reviewed by each expert
14 witness or generated by such witness.
15

16 The Henricksons timely disclosed their experts and the subject matter of their opinions.
17 They did not, however, provide the underlying facts and data upon which the opinions were based.
18 The discovery cutoff in this case is November 24, 2004. Both defendants have moved to exclude
19 testimony by three of the Henricksons' experts, Cory Hoffman, Nancy Collins and Doris Millam.
20 The Henricksons' response as to each will be discussed in turn.

21
22 (a) Cory Hoffman: his testimony will concern the economic impact of the Defendants'
23 alleged negligence on Plaintiffs. Hoffman's CV was also produced.

24 Here the response and production are incomplete. Nowhere does the response detail the
25 underlying facts or data relied on by Hoffman, nor does it include an expert report containing such
26

1 information. This information was due by June 28, 2004. The Henricksons' counsel noted during
2 oral argument that he had obtained Hoffman's report and would mail it to opposing counsel.
3 There has been no showing of willful failure or substantial prejudice. Therefore, if the report was
4 not delivered, the Henricksons must immediately supplement their responses to the requests
5 pursuant to I.R.C.P. 26(e), including the underlying facts and data on which the opinions are
6 based, within 10 days of the date of this order.

7 (b) Nancy Collins: her testimony will concern the continuing care of Mr. Henrickson,
8 as well as the life care impact of the Defendants' alleged negligence upon him. Collins' CV was
9 also produced.
10

11 The same analysis and order as that concerning Cory Hoffman applies here.

12 (c) Doris Millam: because the Henricksons dismissed all causes of action against St.
13 Alphonsus on behalf of their nurses, any argument concerning Doris Millam's opinions on nursing
14 care is no longer necessary.

15 The motions to exclude are denied, but may be reviewed if the Henricksons do not provide
16 the required information within 10 days.

17 **3. Motion to Compel**
18

19 The Henricksons ask the Court for an order compelling certain deposition testimony of
20 Corina Miller, R.N. During Miller's deposition, she was asked by Henricksons' counsel whether
21 she had an opinion about Dr. Souza as a physician. Defense counsel objected to the form and
22 asked how the question was reasonably calculated to lead to the discovery of admissible evidence
23 in the case. Defense counsel also asserted that he felt it was inappropriate to ask Miller to express
24 an opinion concerning a doctor with whom she practices with everyday, without some reasonable
25 connection to the case. The Henricksons now assert that Dr. Souza's professional reputation is
26

1 relevant because Souza was involved with Mr. Henrickson's care. Apparently Souza ordered that
2 the right neck line placed by Dr. Smagula be hooked to a transducer. Souza also observed an
3 arterial waveform and concluded that the blood was arterial in nature.

4 The Court notes that Dr. Souza is not a party, nor has he been designated as an expert
5 witness. During oral argument, the Court asked the Henricksons' counsel why Dr. Souza's
6 reputation is relevant. Counsel responded that if Souza's reputation is attacked by Defendants, it
7 becomes relevant. The Court then asked counsel whether he had any reason to believe that
8 Defendants would attack Souza's credibility and counsel responded that he had no evidence.

9 Under I.R.C.P. 26(b)(1), the scope of discovery includes:
10

11 any matter, no privileged, which is relevant to the subject matter involved in the
12 pending action, whether it relates to the claim or defense of the party seeking
13 discovery or to the claim or defense of any other party, ... It is not ground for
14 objection that the information sought will be inadmissible at the trial if the
information sought appears reasonably calculated to lead to the discovery of
admissible evidence.


15 Based on the foregoing, the Court concludes that Miller's opinion testimony of Dr. Souza
16 is irrelevant and not calculated to lead to the discovery of admissible evidence.. As noted, Dr.
17 Souza is not a party, and thus such testimony does not relate to any claims or defenses of the
18 parties. Further, evidence of Dr. Souza's professional reputation is not admissible under any of the
19 rules of evidence, since he will not be testifying as an expert witness. Even if he were so
20 testifying, it is doubtful that Nurse Miller's opinion of his reputation would be admissible as to his
21 qualifications to give an expert opinion. For these reasons, the motion to compel is denied.
22
23
24
25
26

CONCLUSION

Based upon the foregoing, St. Alphonsus' motion for summary judgment is granted, the motion to exclude is denied, and the motion to compel is denied.

IT IS SO ORDERED.

Dated this 1st day of November, 2004.


Kathryn A. Sticklen
District Judge

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Date: 11-1-04

By J. Kennedy

Deputy Clerk

NO. _____ FILED _____
A.M. _____ P.M. 300

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

MAY 18 2006

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA J. DAVID NAVARRO, Clerk

By Phila Bosman DEPUTY

RECEIVED

MAY 23 2006

GJORDING & FOUSER,
PLLC

H. RAY HARRISON and JULIE
ANDERSON,
Plaintiffs,

Case No. CVPI0400163D

vs.

JEFFREY HARTFORD, M.D., D. LEE
BINNION, M.D. and ST. ALPHONSUS
REGIONAL MEDICAL CENTER, INC.

ORDER DENYING MOTIONS TO
AMEND RE: ST. ALPHONSUS AND
GRANTING MOTION TO AMEND RE:
DR. HARTFORD

Defendants.

On November 15, 2005, the Plaintiffs, Ray Harrison and Julie Anderson,¹ (collectively, "the Harrisons") moved the Court to allow them to amend their Complaint to add a claim for negligent credentialing against the Defendant, St. Alphonsus Regional Medical Center ("St. Alphonsus"). The Harrisons supported their Motion with several hundred pages of deposition material and affidavits. St. Alphonsus opposed on December 5, 2005, and filed several lengthy affidavits in opposition. The Harrisons responded on January 11, 2006, again supporting their memorandum with lengthy affidavits.

On January 17, 2006, the Harrisons filed a second Motion to Amend to add punitive damages against St. Alphonsus and also filed a separate Motion to Amend to add a claim for punitive damages against Dr. Jeffrey Hartford. In both cases, the Harrisons supported their lengthy memoranda with several hundred pages of deposition material and affidavits. St. Alphonsus opposed on February 6, 2006, and Hartford opposed on February 7, 2006. The Harrisons replied in separate memoranda on February 13, 2006.

¹ The Harrisons claim to be married at common law with the common law marriage beginning prior to January 1, 1996.

ORDER DENYING MOTIONS TO AMEND RE: ST. ALPHONSUS
ORDER GRANTING MOTION TO ADD PUNITIVE DAMAGE CLAIM AGAINST HARTFORD
CASE NO. CVPI0400163D

1 St. Alphonsus also moved to strike various statements made by Harrison's experts filed in
2 support of their Motion to Add Punitive Damages. The Harrisons opposed. Although normally a
3 court should rule on the motion to strike before ruling on the underlying motions, it is not
4 necessary to rule on the Motion to Strike given the Court's decision regarding the motions to
5 amend.

6 The Court heard argument April 6, 2006, and took the matters under advisement.

7 However, on April 11, 2006, without leave of court, the Harrisons filed another document
8 entitled "Supplemental Citation of Authorities." This document was filed after the Court closed
9 the record and after the Court heard argument. In this document, the Harrisons argued that
10 numerous cases from other jurisdictions they belatedly cited recognized an action for negligent
11 credentialing. They further argued that in those cases where state courts failed to recognize the
12 cause of action, the immunity provisions within those state statutes unambiguously abrogated
13 such claims. Because they further argued their positions and failed to show good cause why they
14 did not include the material in their prior brief, the Court could have chosen to simply ignore their
15 additional argument. However, in an exercise of discretion, the Court decided to consider their
16 new filing and, therefore, gave St. Alphonsus the opportunity to respond. Pursuant to the Court's
17 scheduling order, St. Alphonsus responded on April 20, 2006, and the Court took the matter under
18 advisement on April 21, 2006.

19 Based on the following, in an exercise of discretion, the Court denies both the Motion to
20 Add a Claim for Negligent Credentialing and the Motion to Amend to Add a Claim for Punitive
21 Damages against St. Alphonsus. In an exercise of discretion, the Court grants the Harrisons'
22 Motion to Add a Claim for Punitive Damages against Dr. Hartford.

23 BACKGROUND

24 The Harrisons filed a Complaint against St. Alphonsus, Dr. Jeffrey Hartford, and Dr. D.
25 Lee Binnion on April 28, 2004, alleging general negligence regarding the care Ray Harrison
26 received from Dr. Hartford, Dr. Binnion, and St. Alphonsus during November 2003. The
27 Harrisons also maintain that throughout the proceedings they have openly asserted a claim for
28

1 negligent credentialing against St. Alphonsus regarding its Peer Review Committee's decision to
2 credential Dr. Hartford. Trial was scheduled to begin June 26, 2006.²

3 The underlying facts of the case arose out of treatment provided to Mr. Harrison in
4 November 2003 when he was admitted to St. Alphonsus for treatment of hyponatremia (sodium
5 deficiency). According to the material presented to the Court, Harrison had been suffering from
6 "considerable fluid loss for a period of approximately seven weeks and had maintained for some
7 period of time a diet of primarily water and alcoholic beverages." Sterns Affidavit, ¶8. The
8 evidence indicates that Harrison drank significant quantities of alcohol daily and that he had a
9 quadruple heart by-pass in March 2003. When he was admitted to St. Alphonsus the blood
10 chemistry studies showed he was suffering from severe chronic hyponatremia and low potassium
11 levels. He presented with nausea, vomiting, diarrhea, imbalance and speech impairment. His
12 blood alcohol was .13 -- nearly twice the legal limit.

13 Defense witnesses testified that Mr. Harrison was at risk for seizures based on his
14 presenting symptoms and low potassium levels. All witnesses, including the Harrisons' expert,
15 agreed that Harrison's sodium level needed to be raised. The experts disagree on how quickly the
16 sodium levels should have been raised.

17 The Harrisons supported their claim for punitive damages against Dr. Hartford with
18 several excerpts from various depositions, as well as, with an affidavit from their medical expert,
19 Dr. Richard Sterns, a professor of medicine at the University of Rochester School of Medicine,
20 and an acknowledged expert in the treatment of hyponatremia (sodium deficiency). Dr. Sterns
21 testified his clinical practice primarily focuses on the treatment of hyponatremia and other
22 electrolyte disorders. In fact, Dr. Sterns has published extensively on the subject.

23 Dr. Sterns testified that Dr. Hartford raised the levels too quickly, causing Harrison to
24 develop central pontine myelinolysis ("CPM"), a disorder characterized by severe damage to the
25 myelin covering of the nerve fibers in the brain stem. CPM causes varying degrees in lost
26 neurological function. As a result, Harrison suffered "lock down" syndrome and permanent brain
27

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² By stipulation, the trial was continued to begin May 2007.

damage. Dr. Sterns opined that Dr. Hartford's "care constituted a gross deviation from the local standard of care for physicians treating hyponatremia in Boise, Idaho 2003."

Both parties, the Harrisons and Dr. Hartford, agree on certain events that occurred during the course of Mr. Harrison's care. Mr. Harrison was admitted to the emergency room at St. Alphonsus on November 15, 2003 at 11:35 p.m. with symptoms of vomiting, diarrhea, and dizziness. A blood test revealed Mr. Harrison had a life-threatening sodium level of 96 mEq/L. Dr. Binnion initially treated Mr. Harrison with an IV of saline to raise his low sodium level. Dr. Hartford later took over care of Mr. Harrison, and at 3:26 a.m. on November 15, 2003, Mr. Harrison was admitted to St. Alphonsus orthopedics unit.

Dr. Hartford continued the sodium treatment begun by Dr. Binnion (200 cc/hr) without modification until 10:00 am on November 17, 2003. Mr. Harrison's condition continued to deteriorate under Dr. Hartford's care, and on November 22, 2003, Dr. Martha Cline diagnosed Mr. Harrison with CPM. The Harrisons claim Dr. Hartford allowed Mr. Harrison's sodium level to rise too rapidly, thus causing CPM. The Harrisons produced the following table illustrating the rise in Mr. Harrison's sodium levels:

| <u>Date</u> | <u>Time</u> | <u>Elapsed Time</u> | <u>Sodium Level</u> | <u>Increase</u> |
|-------------|-------------|---------------------|---------------------|-----------------|
| 11/15/03 | 00:49 | | 96 mEq/L | |
| 11/15/03 | 6:00 | +5:11 | 105 mEq/L | +9 |
| 11/15/03 | 12:27 | +11:38 | 110 mEq/L | +14 |
| 11/15/03 | 17:58 | +17:09 | 114 mEq/L | +18 |
| 11/16/03 | 3:57 | +27:08 | 124 mEq/L | +28 |
| 11/16/03 | 10:10 | +33:21 | 126 mEq/L | +30 |

The Harrisons and Dr. Hartford offer conflicting expert testimony regarding whether and how far Dr. Hartford's conduct fell below the standard of care.

Dr. Richard Sterns testified on behalf of the Harrisons about the minimum accepted standard of care for treating low sodium levels (hyponatremia) in Boise during November 2003. For a "normal" hyponatremic patient, Dr. Sterns testified the accepted treatment would entail sodium correction at a rate no greater than 24 mEq/L over a forty-eight hour period. In a patient

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like Mr. Harrison, who presented with chronic hyponatremia and with no evidence of seizure but with major risk factors for CPM, Dr. Sterns testified the minimum accepted treatment would entail sodium correction at a rate no greater than 12 mEq/L in the first twenty-four hours. According to Dr. Stern, these standards are thoroughly disseminated in publications, and all physicians trained in the treatment of hyponatremic patients should understand and apply those standards of care.

Dr. Sterns further testified that Dr. Hartford's conduct fell well below the local standard of care. Dr. Sterns testified Dr. Hartford should have been well aware "of the substantial risk of severe and often irreversible CPM." He also testified Dr. Hartford should have realized and appreciated "such a rate of sodium increase created an unreasonable risk of serious harm or death to Mr. Harrison and that a high degree of probability existed that such harm would, in fact, occur to Mr. Harrison from such treatment." Dr. Sterns concluded Dr. Hartford's "decision to allow Mr. Harrison's serum sodium to increase at a rate over two times the minimum standard of care constituted a gross deviation from the local standard of care . . . Dr. Hartford's conduct was grossly negligent and/or reckless and was a substantial factor in causing Mr. Harrison's brain damage."

The Harrisons, therefore, moved the Court to allow them to file their First Amended Complaint to add a specific negligent credentialing claim against St. Alphonsus and also moved the Court to allow them to amend their complaint to add claims for punitive damages against Dr. Hartford and against St. Alphonsus. In support of their claim for punitive damages against St. Alphonsus, the Harrisons contend St. Alphonsus' decision to credential supports a claim for punitive damages. They cite to no other basis to support punitive damages against St. Alphonsus.

ANALYSIS

Idaho Rule of Civil Procedure 15(a) allows parties to amend their pleadings once as a matter of right at any time before the opposing party serves a responsive pleading. I.R.C.P. 15(a). Parties may otherwise amend their pleadings "only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires . . .*" *Id.* (emphasis added). However, a court need not grant a motion to amend pleadings if the proposed amendment would not set forth a valid cause of action or if the proposed cause of action is barred. *Black Canyon*

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1 *Racquetball Club, Inc. v. Idaho First Nat'l. Bank*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991);
2 *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct. App. 1986); *Wells v. United States*
3 *Life Ins. Co.*, 119 Idaho 160, 166-167, 804 P.2d 333, 339-340 (Ct. App. 1986). Whether to grant
4 a motion to amend is within the trial court's discretion. *Baxter v. Craney*, 135 Idaho 166, 169, 16
5 P.3d 263, 266 (2000) (citing *Cook v. State Dep't of Transp.*, 133 Idaho 288, 296, 985 P.2d 1150,
6 1158 (1999)).

7 The Harrisons claim that Idaho would recognize a cause of action against a hospital or its
8 peer review committee for negligently granting credentials or privileges to a physician. St.
9 Alphonsus disagrees and relies on the immunity provisions of Idaho Code section 39-1392c.

10 The Harrisons also ask the Court to allow them to amend their complaint to add a claim
11 for punitive damages against St. Alphonsus and against Dr. Hartford pursuant to Idaho Code
12 section 6-1604. The decision whether to allow a plaintiff to amend a complaint to allege punitive
13 damages rests in the sound discretion of the trial court. *Vendelin v. Costco Wholesale Corp.*, 140
14 Idaho 416, 424, 95 P.3d 34, 42 (2004); *Hoglan v. First Sec. Bank of Idaho, N.A.*, 120 Idaho 682,
15 687, 819 P.2d 100, 105 (1991). On a motion to add punitive damages under Idaho Code section
16 6-1604 as amended in 2003, a plaintiff must show a reasonable likelihood that he or she could
17 prove *by clear and convincing evidence* that the defendant acted oppressively, fraudulently,
18 maliciously or outrageously. I.C. § 6-1604.

19 The Court, in an exercise of discretion, denies both motions to amend to add new claims
20 against St. Alphonsus and grants the motion to add a claim for punitive damages against Dr.
21 Hartford.

22 I. NEGLIGENT CREDENTIALING

23 In ruling on this Motion, the Court examines the civil immunity provisions of Idaho's Peer
24 Review Statute and specifically construes Idaho Code section 39-1392c. When called upon to
25 interpret a statute, the court begins with an examination of its literal words. *State v. Dep't of*
26 *Health & Welfare v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995). The court must give
27 the language of a statute its plain, obvious and rational meaning. *State v. Burnight*, 132 Idaho
28 654, 659, 978 P.2d 214, 219 (1999).

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1 The Court's primary function is to determine and give effect to the legislative intent.
2 *Gillihan v. Gump*, 140 Idaho 264, 266, 92 P.3d 514, 516 (2004); *George W. Watkins Family v.*
3 *Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). Such intent should be
4 derived from reading the whole act. *Messenger*, 118 Idaho at 539, 797 P.2d at 1387-88. Where
5 the language of a statute is unambiguous, the plain meaning of a statute will prevail unless clearly
6 expressed legislative intent is contrary or unless plain meaning leads to absurd results.
7 *Messenger*, 118 Idaho at 540, 797 P.2d at 1388; *see also Corporation of Presiding Bishop v. Ada*
8 *County*, 123 Idaho 410, 415, 849 P.2d 83, 88 (1993). Likewise, in construing a statute, the court
9 "will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the
10 purpose and intent of the legislature, based on the whole act and every word therein, lending
11 substance and meaning to the provisions." *Ada County Assessor v. Roman Catholic Diocese of*
12 *Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993).

13 Only where a statute is ambiguous should a court engage in statutory interpretation. A
14 statute is "ambiguous where reasonable minds might differ or be uncertain as to its meaning."
15 *State v. Doe*, 140 Idaho 271, 92 P.3d 521 (2004) (citing *Ada County v. Gibson*, 126 Idaho 854,
16 856, 893 P.2d 801, 803 (Ct. App. 1995). "[A]mbiguity is not established merely because different
17 possible interpretations are presented to a court. If this were the case then all statutes that are the
18 subject of litigation could be considered ambiguous." *Matter of Permit No. 36-7200*, 121 Idaho
19 819, 823, 828 P.2d 848, 852 (1992).

20 Idaho Code section 39-1392c that contains the language at issue was amended in 2003. It
21 provides, in relevant part, as follows:

22 Immunity from civil liability – The furnishing of information or provision of
23 opinions to any health care organization *or* the receiving and use of such
24 information and opinions shall not subject any health care organization [St.
25 Alphonse] or other person to any liability or action for money damages or other
legal or equitable relief.

26 I.C. § 39-1392c (Michie Supp. 2005) (emphasis added). The 2003 amendments to the Peer
27 Review Statute also expanded the definition of "peer review" to clearly include hospital
28 "credentialing" activities. I.C. § 39-1392a(11)(a). Idaho Code section 39-1392a, as amended in
29 2003, provides in part:

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(11) "Peer review" means the collection, interpretation and analysis of data by a health care organization for the purpose of bettering the system of delivery of health care or to improve the provision of health care or to otherwise reduce patient morbidity and mortality and improve the quality of patient care. Peer review activities by a health care organization include, without limitation:

(a) Credentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization;

I.C. § 39-1392a(11) (emphasis added). The parties agree that the 2003 amended language, rather than the earlier code language, applies to the Harrisons' complaint. St. Alphonsus argues that Idaho does not recognize the tort of negligent credentialing and contends that the immunity provisions of Idaho's Peer Review Act bar any such claim. The Court agrees.

A. I.C. § 39-1392c bars a claim of negligent credentialing against St. Alphonsus.

The Court finds that the 2003 language is unambiguous and, thus, the Court need not engage in statutory interpretation. *Corporation of Presiding Bishop*, 123 Idaho at 415, 849 P.2d at 88. St. Alphonsus, as a health care organization, is immune from civil suit for *the use of information* in credentialing a physician.³

While the Harrisons suggest that "use of information" does not create immunity for the act of credentialing, their contention is nonsensical. The Court cannot agree with the Harrisons' strained interpretation. The Harrisons' logic would place this Court in the untenable position of granting St. Alphonsus immunity for reading the material but simultaneously holding St. Alphonsus liable for using the contents read by the committee in the material when granting or denying credentials. As St. Alphonsus contends, the act of issuing the credential is *the ultimate use of credentialing material*.

The language recently added to the Idaho Code clearly makes the *act of credentialing* a peer review activity subject to immunity. "Peer review activities by a health care organization include, without limitation: Credentialing, privileging or affiliating of health care providers as members of, or providers for, a health care organization." I.C. § 39-1392a(11).

³ This construction is consistent with Judge Burnett's concurring opinion in *Murphy v. Wood*, in which he opined "... the committee is immune from any civil liability for its 'use' of information concerning the patient. I.C. § 39-1392c." *see* 105 Idaho 180, 188, 667 P.2d 859, 867 (Burnett, J., concurring).

Further, the Harrisons do not clarify what activities are encompassed by the term "use of" under their interpretation of the immunity provisions. There is no reason to grant St. Alphonsus immunity for merely reading a document. The Court can imagine no tort claim arising from the mere reading of or handling such material. Immunity would only be necessary to immunize *actions* taken. If "use of" does not include the act of credentialing, it would be superfluous. If the legislature wanted to exclude credentialing from immunity, as the Harrisons contend it did, it could have simply crafted the immunity provision as follows:

The furnishing of information or provision of opinions to any health care organization . . . shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief.

Because the legislature employed the language "use of such information and opinions," the Harrisons' position cannot be sustained. The legislature inserted "use of" to make clear that hospitals and members of credentialing committees are immune. Therefore, the Court finds the legislature clearly intended to extend immunity to hospitals and hospital peer review committees for acts involved in credentialing physicians, including the act of credentialing itself.

Moreover, when the legislature amends a statute, as it did here to clearly encompass credentialing activities, the Court presumes the legislature intended to change the statute's application. *DeRousse v. Higginson*, 95 Idaho 173, 176, 505 P.2d 321, 324 (1973) (citing *Anderson v. Rayner*, 60 Idaho 706, 713, 96 P.2d 244, __ (1939)). "When a statute is amended, it is presumed that the legislature intended it to have a meaning different than that accorded to it before the amendment." *Id.* (quoting *Wellard v. Marcum*, 82 Idaho 232, 239, 351 P.2d 482, __ (1960)); see also *Employment Security Agency v. Joint Class 'A' School District No. 151*, 88 Idaho 384, 391, 400 P.2d 377, 384 (1965). Therefore, inasmuch as the legislature made substantial changes to section 39-1392a, Idaho Code, amending "peer review" to clearly include credentialing activities, the Court presumes that the legislature intended for the statutes to have a different meaning from that accorded to them before the amendment. In making such a statutory construction, it is a "universal rule of statutory construction that a statute must be construed in the light of its intent and purpose." *Security Agency*, 88 Idaho at 391, 400 P.2d at 384. Thus, the Court's ruling is consistent with this rule of construction.

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1 Finally, the Court's interpretation is consistent with *Murphy v. Wood*, 105 Idaho 180, 667
2 P.2d 859 (Ct. App. 1983). The Court of Appeals in interpreting an earlier much more limited
3 version of this medical privilege and immunities statute unambiguously ruled that the court
4 should *broadly* apply the immunities created by the Act to fulfill its legislative purpose.

5 In viewing the act as a whole, including this statement of purpose, we believe that
6 the legislature intended to establish a broad privilege for the records and
7 proceedings of hospital medical staff committees. . . . We conclude that the Idaho
8 statute was intended to provide broad protections of confidentiality, privilege and
9 immunities than are afforded by mere peer review statutes.

10 *Murphy*, 105 Idaho at 184, 667 P.2d at 863 (emphasis added).

11 Therefore, the Court finds that when a hospital "uses" confidential peer review
12 information in credentialing a physician, the immunity provided in section 39-1392c applies.
13 Thus, this provision bars negligent credentialing claims against hospitals in Idaho.

14 **B. The Harrisons' case law does not change this Court's interpretation.**

15 The Harrisons correctly claim that some jurisdictions have ruled state statutes protecting
16 peer review confidentiality do not impliedly abrogate a cause of action for negligent credentialing.
17 See e.g., *Ex parte Qureshi*, 768 So. 2d 374, 380 (Ala. 2000); *Sun Health Corporation v. Superior*
18 *Court*, 70 P.3d 444, 446-447, 448 (Az. Ct. App. 2003); *Browning v. Burt*, 613 N.E.2d 993, 1006-
19 1007 (Ohio 1993); *Greenwood v. Wierdsma*, 741 P.2d 1079, 1087-1088 (Wyo. 1987). However,
20 those cases either did not involve the application of immunity provisions at all or did not involve
21 immunity provisions similar to Idaho's immunity provision.

22 In most of the cases cited by the Harrisons, the courts were simply asked to determine
23 whether the fact credentialing records were confidential by statute impliedly abrogated a cause of
24 action for negligent credentialing. See, e.g., *Ex parte Qureshi*, 768 So. 2d at 380; *Sun Health*
25 *Corporation*, 70 P.3d at 446-448; *Greenwood*, 741 P.2d at 1087-1088. Most courts faced with
26 that question ruled that confidentiality *alone* does not abrogate such a cause of action by
27 implication. *Id.* This is not the issue before this Court. This case directly implicates the
28 application of the Idaho immunity provision found in Idaho Code section 39-1392c, and St.
29 Alphonsus does not ask the Court to rule that peer review confidentiality *by itself* impliedly
30 abrogated a cause of action for negligent credentialing.

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1. Cases regarding the implied effect of peer review confidentiality on negligent credentialing claims are inapplicable.

In *Qureshi*, the plaintiff challenged Alabama's peer-review statute, Alabama Code 1975 section 22-21-8, contending that by simply shielding peer-review records (including credentialing records) from disclosure, it unconstitutionally abrogated a cause of action for negligent credentialing. *Ex parte Qureshi*, 768 So. 2d at 380. In ruling that merely precluding discovery of such records did not abrogate this cause of action, the Alabama court did not consider any immunity provisions; it only interpreted its peer-review statute as it applied to credentialing records.⁴ In fact, the Alabama statutes do not extend immunity to the use of such records in credentialing, and the Alabama constitution directly protects an individual's right to pursue causes of action in open courts. *See* Ala.Const. art. I §§ 10, 13. Thus, the Alabama Supreme Court held the state's peer review statute did not unconstitutionally or impliedly bar a patient from prosecuting his or her claim against a hospital for negligent hiring and credentialing because the statute did not preclude a patient from obtaining the peer review documents from the original and unprivileged sources. *Ex parte Qureshi*, 768 So.2d at 380.

⁴ Alabama Code 1975 sec. 22-21-8. Confidentiality of accreditation, quality assurance credentialing materials, etc.

(a) Accreditation, quality assurance and similar materials as used in this section shall include written reports, records, correspondence, and materials concerning the accreditation or quality assurance or similar function of any hospital, clinic, or medical staff. The confidentiality established by this section shall apply to materials prepared by an employee, advisor, or consultant of a hospital, clinic, or medical staff and to materials prepared by an employee, advisor or consultant of an accrediting, quality assurance or similar agency or similar body and to any individual who is an employee, advisor or consultant of a hospital, clinic, medical staff or accrediting, quality assurance or similar agency or body.

(b) All accreditation, quality assurance credentialing and similar materials shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional or institution arising out of matters which are the subject of evaluation and review for accreditation, quality assurance and similar functions, purposes, or activities. No person involved in preparation, evaluation or review of accreditation, quality assurance or similar materials shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the course of preparation, evaluation, or review of such materials or as to any finding, recommendation, evaluation, opinion, or other action of such accreditation, quality assurance or similar function or other person involved therein. Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within his knowledge, but the witness testifying should not be asked about any opinions or data given by him in preparation, evaluation, or review of accreditation, quality assurance or similar materials.

Ala.Code § 22-21-8(1975).

Likewise, in *Sun Health Corporation*, the Arizona court interpreting Arizona Revised Statutes, Sections, 32-1451.01⁵ and 36-445.01,⁶ simply ruled that protecting credentialing records from disclosure did not impliedly abrogate a patient's right to bring a cause of action for negligent credentialing because the patient could still get such information from other sources.⁷ *Sun*

⁵ The Arizona Revised Statutes, section 32-1451.01 provides, in relevant part, as follows:

Right to examine and copy evidence; witnesses; documents; testimony; representation

C. Patient records, including clinical records, medical reports, laboratory statements and reports, any file, film, other report or oral statement relating to diagnostic findings or treatment of patients, any information from which a patient or the patient's family might be identified or any information received and records or reports kept by the board as a result of the investigation procedure outlined in this chapter are not available to the public.

D. This section and any other law making communications between a physician and a physician's patient privileged does not apply to investigations or proceedings conducted pursuant to this chapter. The board and its employees, agents and representatives shall keep in confidence the names of any patients whose records are reviewed during the course of investigations and proceedings pursuant to this chapter.

E. Hospital records, medical staff records, medical staff review committee records and testimony concerning these records and proceedings related to the creation of these records are not available to the public, shall be kept confidential by the board and are subject to the same provisions concerning discovery and use in legal actions as are the original records in the possession and control of hospitals, their medical staffs and their medical staff review committees. The board shall use such records and testimony during the course of investigations and proceedings pursuant to this chapter.

A.R.S. § 32-1451.01.

⁶ The Arizona Revised Statutes, section 36-445.01 provides, in relevant part, as follows:

A. All proceedings, records and materials prepared in connection with the reviews provided for in § 36-445, including all peer reviews of individual health care providers practicing in and applying to practice in hospitals or outpatient surgical centers and the records of such reviews, are confidential and are not subject to discovery except in proceedings before the Arizona medical board or the board of osteopathic examiners, or in actions by an individual health care provider against a hospital or center or its medical staff arising from discipline of such individual health care provider or refusal, termination, suspension or limitation of the health care provider's privileges. No member of a committee established under the provisions of § 36-445 or officer or other member of a hospital's or center's medical, administrative or nursing staff engaged in assisting the hospital or center to carry out functions in accordance with that section or any person furnishing information to a committee performing peer review may be subpoenaed to testify in any judicial or quasi-judicial proceeding if the subpoena is based solely on those activities.

B. This article does not affect any patient's claim to privilege or privacy or to prevent the subpoena of a patient's medical records if they are otherwise subject to discovery or to restrict the powers and duties of the director pursuant to this chapter, with respect to records and information that are not subject to this article. In any legal action brought against a hospital or outpatient surgical center licensed pursuant to this claiming negligence for failure to adequately do peer review, representatives of the hospital or center are permitted to testify as to whether there was peer review as to the subject matter being litigated. The contents and records of the peer review proceedings are fully confidential and inadmissible as evidence in any court of law.

A.R.S. § 36-445.01

⁷ The Arizona Constitution like Alabama's Constitution, contains an anti-abrogation provision that prohibits the Arizona Legislature from abrogating certain causes of action. *See* Ariz.Const. art. 16 § 6; *see also Humana Hosp. Desert Valley v. Superior Court*, 742 P.2d 1382 (1987) (discussing Arizona's peer review statute and anti-abrogation clause).

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1 *Health*, 70 P.3d at 446-447, 448. The Arizona court was not asked to consider any immunity
2 provisions, let alone an immunity provision similar to the Idaho immunity provision.

3 Similarly, in *Greenwood*, the Wyoming court only interpreted the effect of peer-review
4 confidentiality statutes⁸ on a claim for negligent credentialing and specifically recognized its
5 legislature's authority to abrogate such a claim. *Greenwood*, 741 P.2d 1079, 1087-1088. The
6 court opined as follows:

7 If the legislature had wanted to prohibit actions against hospitals for breaching
8 their duties to properly supervise the qualifications and privileges of their medical
9 staffs, it would have done so expressly. We will not construe the privilege statute
to impliedly prohibit this category of negligence actions.

10 *Id.* At 1087.

11 Unlike Wyoming, Alabama, Arizona, in addition to making peer review materials
12 confidential, the Idaho legislature *expressly* extended immunity to hospitals for the *use of* peer
13 review materials, including credentialing.

14 **2. Idaho's peer review immunity statute is unique.**

15 St. Alphonsus argues that each state's peer review statute is different, making most of the
16 Harrisons' case law recently cited in their Supplemental memorandum inapplicable. The Court
17 agrees. Every peer review statute is unique to that particular jurisdiction and uniformity among
18 these statutes does not exist. Sweeping generalizations cannot be made.

19 For example, a large number of jurisdictions cited by the Harrisons extend immunity only
20 to individuals, peer review committees or medical societies but not to hospitals.⁹ See, e.g.,
21

22
23 ⁸ The privilege statutes at issue in *Greenwood* provided:

24 All reports, findings, proceedings and data of such hospital medical staff committees shall be
confidential and privileged.

25 Wyo. Stat. Ann. § 35-2-602 (Michie, 1977).

26 As used in this act [§§ 35-2-601 to 35-2-604], 'data' means [sic] all reports, notes, findings,
27 opinions or records of any hospital medical staff committee, including its consultants, advisors and
28 assistants. As used in this act, 'hospital medical staff committee' means any committee within a
hospital, consisting of medical staff members or hospital personnel, which is engaged in
supervision, discipline, admission, privileges or control of members of the hospital's medical staff,
evaluation and review of medical care, utilization of hospital facilities or professional training.

29 *Id.* § 35-2-604.

30 ⁹ Ala.Code §6-5-333(a) (Alabama); Ak St §18.23.010 & 18.23.020 (Alaska); Cal. Civ. Code §43.7(b) (California);
CGS §19a-17b(b) & (c) (Connecticut); MCA §37-2-201(1) (Montana); Nebraska Statutes §71-147.01; N.J. Statutes

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1 *Browning v. Burt*, 613 N.E.2d 993, 1006-1007 (Ohio 1993). In those jurisdictions, immunity
2 would not preclude a negligent credentialing claim against a hospital. Therefore, their case law
3 simply does not apply to the case before this Court. See I.C. § 38-1392a, 39-1392c (including
4 hospitals and in-hospital medical staff committees in the definition of "health care organizations"
5 protected by the immunity provision).

6 A few jurisdictions cited by the Harrisons, like Arizona, Kentucky, Oklahoma,
7 Washington and West Virginia, immunize some hospital actions but either clearly limit immunity
8 to claims brought by *physicians*¹⁰ or extend immunity to hospitals *only* for publishing information
9 or reports to medical review boards or other peer review entities.¹¹ In other jurisdictions,
10 credentialing activities are not covered under "peer review" statutes at all because credentialing is
11 not defined as a peer review activity; thus, peer review immunity does not extend to credentialing
12 in those jurisdictions.¹² See, e.g., *McCall v. Henry Medical Center, Inc.*, 551 S.E.2d 739, 742-43
13 (Ga. 2002) (holding peer review immunity provision did not immunize credentialing because
14 credentialing was *not* peer review). Therefore, these cases do not apply to the case before this
Court.

16 Likewise, the reasoning in the *Browning* case relied on heavily by the Harrisons, does not
17 apply when interpreting the Idaho statute. The Ohio Supreme Court interpreted an earlier¹³
18

19 §2A:84A-22.10 (New Jersey); O.R.S. §41.675 (Oregon); P.S. §425.3 (Pennsylvania); RI St. §23-17-25 (Rhode
20 Island); Va. Code §8.01-581.16 (Virginia); Wy. St. §35-17-103 (Wyoming).

21 ¹⁰ See A.R.S. § 36-445.02B (Arizona); KRS §311.377 (Kentucky); RCWA §4.24.240(d) (Washington).

22 ¹¹ See 63 Okl.St. Ann. §1-1709 (Oklahoma); W.Va. Code §30-3-14 (West Virginia).

23 ¹² See C.G.S. §19a-17b(a)(2) (Connecticut); V.A.M.S. §537.035 (Missouri) and *State Ex rel Faith Hosp. V. Enright*,
24 706 S.W.2d 852, 855 (Mo. 1986); TCA §63-6-219(c) (Tennessee).

25 ¹³ Effective July 2003, the Ohio legislature comprehensively rewrote the provision interpreted in *Browning*. The
26 revisions specifically address negligent credentialing and severely restrict the circumstances under which a claim for
27 negligent credentialing can be brought. Ohio Revised Code section 2305.251(B)(1) now provides in relevant part as
follows:

28 (B)(1) A hospital shall be presumed to not be negligent in the credentialing of an individual who
29 has, or has applied for, staff membership or professional privileges at the hospital pursuant to
section 3701.351 of the Revised Code, . . . if the hospital, . . . proves by a preponderance of the
evidence that, at the time of the alleged negligent credentialing of the individual, the hospital, . .
was accredited by one of the following:

- 30 (a) The joint commission on accreditation of healthcare organizations;
- 31 (b) The American osteopathic association;
- (c) The national committee for quality assurance;
- (d) The utilization review accreditation commission.

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version of the Ohio peer review immunity provisions and held those immunity provisions did not bar a cause of action against a hospital for negligent credentialing. *Browning v. Burt*, 613 N.E.2d 993, 1006-1007 (Ohio 1993).¹⁴ Contrary to the Harrison's contention, however, Ohio's immunity statute was much more limited than Idaho's statute. The Ohio immunity statute interpreted in *Browning*, Ohio Rev. Code Ann., § 2305.25, provided, in relevant part, as follows:

No hospital, no state or local society, and no individual who is a member or employee of any of the following committees shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the committee:

* * *

(E) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine and surgery, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or registered pharmacists.

* * *

Nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient.

This section shall also apply to any member or employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators or of a peer review or professional standards review committee. No person who provides information under this section and provides such information without malice and in the reasonable belief that such information

(2) The presumption that a hospital, . . . is not negligent as provided in division (B)(1) of this section may be rebutted only by proof, by a preponderance of the evidence, of any of the following:

(a) The credentialing and review requirements of the accrediting organization did not apply to the hospital, . . . the individual, or the type of professional care that is the basis of the claim against the hospital. . . .

(b) The hospital, . . . failed to comply with all material credentialing and review requirements of the accrediting organization that applied to the individual.

(c) The hospital . . . sufficiently in advance to take appropriate action, knew that a previously competent individual had developed a pattern of incompetence or otherwise inappropriate behavior, either of which indicated that the individual's staff membership, professional privileges, or participation as a provider should have been limited or terminated prior to the individual's provision of professional care to the plaintiff.

(3) If the plaintiff fails to rebut the presumption provided in division (B)(1) of this section, upon the motion of the hospital . . . the court shall enter judgment in favor of the hospital . . . on the claim of negligent credentialing.

OH ST §2305.251 (emphasis added).

¹⁴ While the Harrisons also cited *Phillips v. Burt*, 1995 Ohio App. LEXIS 2418 (Ohio Ct.App. 1995), *Phillips* was unpublished and cannot be cited.

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1 is warranted by the facts known to him shall be subject to suit for civil damages as
2 a result thereof.

3 *Id.* (emphasis added). The Ohio court held that this statute extended limited protection to those
4 who *provided* information to certain review boards and committees to encourage the free flow of
5 information without threat of reprisal in the form of civil liability. *Browning*, 613 N.E.2d at
6 1006-1007. The Ohio court also ruled that statute sought to protect only those *serving on*
7 *committees* and committee employees because "it could be difficult to staff a committee absent
8 such protections." *Id.* at 1007. In applying the above immunity statute to the facts, the Ohio court
9 held the defending hospital had neither provided information to a committee nor participated in a
10 committee. *Id.* Thus, the Ohio court ruled this immunity statute did not apply because Ohio
11 Code section 2305.25 did not provide blanket immunity to a hospital for negligence in granting or
12 continuing staff privileges of an incompetent physician.

13 Those states that have not permitted a negligent credentialing cause of action have
14 generally based their decisions on state statutes that grant hospitals "peer review" immunity for
15 their credentialing activities. *See, e.g. St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503
16 (Texas 1997) (holding that before a health care entity can be liable for actions taken during peer
17 review -- including credentialing -- malice must be shown);¹⁵ *see also, Lemuz v. Fieser*, 933 P.2d
18 134 (Kan. 1997).¹⁶ In comparing the immunity language in Ohio, Kansas and Texas to the Idaho

19
20 ¹⁵ The Texas Act provides, in pertinent part, as follows:

21 (1) A cause of action does not accrue . . . the health-care entity from any act, statement, determination or
22 recommendation made, or act reported, without malice, in the course of peer review as defined by this Act.

23 (m) A . . . health-care entity, . . . that, without malice, participates in medical peer review activity or furnishes
24 records, information, or assistance to a medical peer review committee or the board is immune from any civil liability
25 arising from such an act.

26 Tex.Rev.Civ. Stat. Ann. art. 4495b, § 5.06(1), (m) (emphasis added).

27 "Medical peer review committee" means "a committee of a health-care entity . . . authorized to evaluate the
28 quality of medical and health-care services or the competence of physicians." *Id.* § 1.03(a)(6). "Medical peer review"
29 means "the evaluation of medical and health-care services, including evaluation of the qualifications of professional
30 health-care practitioners and of patient care rendered by those practitioners." *Id.* § 1.03(a)(9). The definitions of
31 "medical peer review committee" and "medical peer review" clearly contemplate, among other things, the process
known as "credentialing"--the granting or retention of a doctor's hospital privileges. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d at 505.

¹⁶ The Kansas Act provides: "There shall be no liability on the part of and no action for damages shall arise against
any licensed medical care facility because of the rendering of or failure to render professional services within such
medical care facility by a person licensed to practice medicine and surgery if such person is not an employee or agent
of such medical care facility." K.S.A. 65-442(b)

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statute, the Idaho statute is much more inclusive and more specific than either the old Ohio statute or those state statutes found to immunize hospitals for credentialing decisions. Under Idaho's statute, immunity is not limited to participating in or providing information to a credentialing committee or to actions taken without malice. Idaho's statute clearly immunizes a hospital for credentialing regardless of whether it actually participated in the peer review committee.

Finally, unlike many other state constitutions, article XXI, section 2 of the Idaho Constitution specifically provides that the legislature has the power to modify or repeal common law causes of action. At the core of several court decisions cited by the Harrisons, the courts found state constitutions precluded the abrogation of certain claims. *See e.g., Humana Hosp. Desert Valley v. Superior Court*, 742 P.2d 1382 (1987) (discussing Arizona's peer review statute and anti-abrogation clause). The Idaho Supreme Court has held that the legislature can abolish common law causes of action entirely or impose restrictions. "It is the province of the Legislature, and not the court, to modify the rules of the common law." *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 544, 96 P.3d 637, 645 (2004) (citing *Moon v. Bullock*, 65 Idaho 594, 607, 151 P.2d 765, 771 (1944)).

3. The remaining cases cited by the Harrisons do not involve the application or interpretation of either a peer review confidentiality statute or an immunity provision.

While the Harrisons also rely in their Supplemental Authority on the following cases in support of their position, none of these cases involves the application of either a peer review confidentiality statute or an immunity provision. They simply do not support the Harrisons' argument. The Court carefully reviewed every case the Harrisons cited.

In reviewing the cases, most jurisdictions that recognize a negligent credentialing cause of action generally adopt the "corporate liability" theory where, *in the absence of immunity provisions similar to the Idaho statute*, the corporate entity owes a separate duty of care to patients to only permit physicians with proper credentials to use its facilities. These cases do not discuss the application of peer review immunity provisions. *See, e.g., Fletcher v. South Peninsula Hospital*, 71 P.3d 833, 842-843 (Alaska 2003);¹⁷ *Neff v. Johnson Memorial Hospital*, 889 A.2d

¹⁷ Alaska law only immunizes peer review committee members. *See* Ak St §18.23.010 & 18.23.020.

921 (Conn.App. 2006);¹⁸ *Darling v. Charleston Community Memorial Hosp.*, 211 N.E.2d 253 (Ill. 1965); *Jones v. Chicago HMO LTD of Illinois*, 730 N.E.2d 1119 (Ill. 2000); *Blanton v. Moses H. Cone Memorial Hosp., Inc.*, 354 S.E.2d 455 (N.C. 1987); *Strubhart v. Perry Memorial Hospital Trust Authority*, 903 P.2d 263 (Ok. 1995);¹⁹ *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991);²⁰ *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993).²¹ However, none of the jurisdictions applying the corporate liability theory to credentialing has peer review immunity provisions like the Idaho provision. At least one jurisdiction adopting the corporate negligence theory, found that its statutory scheme actually *imposed* a duty on hospitals to properly credential physicians. *See Elam v. College Park Hospital*, 183 Cal.Rptr. 156 (1982).

Other cases cited by the Harrisons approve negligent credentialing claims but do not discuss immunity provisions. *See, e.g., Wellstar v. Green*, 572 S.E.2d 731 (Ga.App. 2002) (finding negligent credentialing claims are not based on vicarious liability); *Sharsmith v. Hill*, 764 P.2d 667 (Wy. 1988) (holding hospital has duty to exercise reasonable care in supervising and reviewing patient treatment by its staff and physicians).²²

Some cases cited by the Harrisons consider whether a negligent credentialing claim should be treated like a medical malpractice claim subject to the medical malpractice review panel requirements; they do not address peer review immunity. *See, e.g., Winona Memorial Hospital, Ltd. v. Kuester*, 737 N.E.2d 824 (Ind. 2000); *EUSA v. Blanchard*, 899 So.2d 41 (La.App. 1 Cir. 2005) (finding that under a recent change in Louisiana law, a potential negligent credentialing claim is subject to a medical malpractice review panel as a condition precedent to filing a suit but the court does not address the actual viability of negligent credentialing claims generally).

The remaining cases, cited by the Harrisons in their Supplemental Authority, simply do not address the recognition of a negligent credentialing cause of action at all or only address issues tangential to negligent credentialing. *See, e.g. Kitto v. Gilbert*, 570 P.2d 544 (Colo.App. 1977) (no discussion of negligent credentialing); *Columbia/JFK Medical Center Ltd. v.*

¹⁸ Connecticut law only immunizes peer review committee members. *See* CGS §19a-17b(b) & (c).

¹⁹ Oklahoma law only immunizes peer review committee members. *See* Wy.St. §35-17-103.

²⁰ Pennsylvania law only immunizes peer review committee members. *See* P.S. §425.3.

²¹ Rhode Island law only immunizes peer review committee members. *See* RI St. §23-17-25.

²² Wyoming law only immunizes peer review committee members. *See* Wy.St. §35-17-103.

1 *Sanguonchitte*, 920 So.2d 711 (Fla.Dist.Ct.App. 2006) (a discovery case, no discussion of
2 negligent credentialing); *Leanhart v. Humana, Inc.*, 933 S.W.2d 820 (Ky. 1996) (a discovery case,
3 no discussion of negligent credentialing); *Ferguson v. Gonyaw, D.O.*, 236 N.W.2d 543
4 (Mich.App. 1976) (no application of peer review immunity); *Hull v. North Valley Hospital*, 498
5 P.2d 136 (Mont. 1972) (no discussion of negligent credentialing; predates Montana's peer review
6 statute that only immunizes members of such committees); *Gridley v. Johnson*, 476 S.W.2d 475
7 (Mo. 1972) (direct hospital negligence case, not involving negligent credentialing); *Rule v.*
8 *Lutheran Hosp. & Homes Society*, 835 F.2d 1250 (8th Cir. 1987) (applying Nebraska law which
9 immunizes only peer review committees); *Oehler v. Humana, Inc.*, 775 P.2d 1271 (Nev. 1989)
10 (negligent supervision, not a negligent credentialing case); *Corleto v. Shore Memorial Hosp.*, 350
11 A.2d 534 (N.J. 1975) (not a negligent credentialing case; predates New Jersey's peer review
12 statute that only immunizes committee members); *Raschel v. Rish, M.D.*, 488 N.Y.S.2d 923
13 (1985); *Benedict v. St. Luke's Hospitals*, 365 N.W.2d 499 (N.D. 1985) (predating North Dakota's
14 limited immunity provisions enacted in 1997 that provides limited immunity to health care
5 organizations for the use of peer review material but only if the organization acted without
16 malice);²³ *Huffaker, M.D. v. Bailey*, 540 P.2d 1398 (Ore. 1975) (physician denied privileges sued
17 for privileges); *Prince v. Coffee County*, 1996 WL 221863²⁴ (Tenn.Ct.App. 1996) (denying a
18 motion to amend);²⁵ *Stottlemeyer v. Ghramm*, 2001 WL 3484307²⁶ (Va.Cir.Ct. 2001) (application
19 of peer review immunity was not raised);²⁷ *Burnet v. Spokane Ambulance*, 933 P.2d 1036 (Wa.
20 1997) (involving discovery); *Utter v. United Hosp. Center, Inc.*, 236 S.E.2d 213 (W.Va. 1977)
21 (involving direct negligence not negligent credentialing).

22
23
24 ²³ ND ST 23-34-06 (2) "A health care organization, health care provider, or member of a peer review committee is
25 not liable in damages to any person for any action taken or recommendation made regarding a professional peer
26 review, if the organization, provider, or committee member acts without malice and in the reasonable belief that the
27 action or recommendation is warranted by the facts known to the organization, provider, or committee member."

28 ²⁴ This case was not reported in the S.W.2d reporter.

29 ²⁵ Credentialing is not peer review under Tennessee law. See TCA §63-6-219(c).

30 ²⁶ This case was not reported in the S.E.2d reporter. Furthermore, the case discusses the split of authority among the
31 appellate divisions in Virginia. The court also notes that Virginia's immunity provision seems to grant immunity to
peer review committee members but not to hospitals. However, this was not considered by the court because no party
raised this issue.

²⁷ Virginia law only immunizes peer review committee members. See Va. Code §8.01-581.

1 The *Prissel* case relied on by the Harrisons was unpublished and has no precedential
2 value.²⁸ *Prissel v. Physicians Ins. Co. of Wisconsin, Inc.*, 674 N.W.2d 680 (Wis.App. 2003).

3 Having thoroughly reviewed all the cases cited by the Harrisons, the Court finds that none
4 of them changes the Court's analysis. In ruling on a motion to amend to add new claims, a court
5 may "consider whether the allegations sought to be added to the complaint state a valid claim in
6 determining whether to grant leave to amend the complaint." *Estate of Becker v. Callahan*, 140
7 Idaho 522, ___, 96 P.3d 623, 628-629 (2004) (citing *Black Canyon Racquetball Club, Inc. v. Idaho*
8 *First Nat'l Bank N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991)).

9 Therefore, given the Court's above analysis, and in an exercise of discretion, the Court
10 denies the Harrisons' Motion to Amend to Add a Claim for Negligent Credentialing because it
11 would not state a valid claim under Idaho law.

12 II. PUNITIVE DAMAGES

13 The decision whether to allow a plaintiff to amend a complaint to allege punitive damages
14 rests in the sound discretion of the trial court. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho
15 416, 424, 95 P.3d 34, 42 (2004); *Hoglan v. First Sec. Bank of Idaho, N.A.*, 120 Idaho 682, 687,
16 819 P.2d 100, 105 (1991). "Punitive damages are not favored in law and should be awarded in
17 only the most unusual and compelling circumstances." *Gunter v. Murphy's Lounge, LLC*, 141
18 Idaho 16, 29, 105 P.3d 676, 689-690 (2005); *Griff, Inc. v. Curry Bean Co., Inc.*, 138 Idaho 315,
19 320, 63 P.3d 441, 446 (2003). Finally, an award of punitive damages will be sustained on appeal
20 only when it is shown that the defendant acted in a manner that was "an extreme deviation from
21 reasonable standards of conduct, and that the act was performed by the defendant with an
22 understanding of or disregard for its likely consequences." *Vendelin*, 140 Idaho at 431, 95 P.3d at
23 41 (quoting *Cheney*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983)).

24 Prior to 2003, a plaintiff had to show on a motion to add punitive damages under Idaho
25 Code section 6-1604 a reasonable likelihood that he or she could prove that the defendant acted
26 oppressively, fraudulently, wantonly, maliciously, or outrageously by a preponderance of the

27
28 ²⁸ The Westlaw editors warn readers with the following statement: "NOTICE: UNPUBLISHED OPINION. RULE
29 809.23(3), RULES OF CIVIL PROCEDURE, PROVIDE THAT UNPUBLISHED OPINIONS ARE OF NO

evidence. *Vendelin*, 140 Idaho at 424, 95 P.3d at 42; *Hoglan*, 120 Idaho at 687, 819 P.2d at 105. However, the legislature amended this statute effective 2003. See I.C. § 6-1604.

The 2003 amendments alter a plaintiff's ability to pursue punitive damages in several significant ways, thereby making punitive damages more difficult to award. The legislature increased the plaintiff's burden of proof by now requiring any party claiming punitive damages to prove his or her claim by "clear and convincing" evidence. The legislature also deleted wanton²⁹ conduct as a basis for punitive damages. Finally, the legislature now requires the court to have a hearing and weigh the evidence presented at that hearing in determining whether the moving party has established a "reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." This places a heavy burden on the plaintiff. The new Idaho Code section 6-1604 governing motions to amend pleadings to add punitive damages claims, provides in part as follows:

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive,³⁰ fraudulent,³¹ malicious³² or outrageous³³ conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages.

PRECEDENTIAL VALUE AND MAY NOT BE CITED EXCEPT IN LIMITED INSTANCES." *Prissel v. Physicians Ins. Co. of Wisconsin, Inc.*, 674 N.W.2d 680 (Wis.App. 2003).

²⁹ "Unreasonably or maliciously risking harm while being utterly indifferent to the consequences. In criminal law, wanton *usu.* connotes malice (in the criminal-law sense), while reckless does not.

Wanton differs from reckless both as to the actual state of mind and as to the degree of culpability. One who is acting recklessly is fully aware of the unreasonable risk he is creating, but may be trying and hoping to avoid any harm. One acting wantonly may be creating no greater risk of harm, but he is not trying to avoid it and is indifferent to whether harm results or not. Wanton conduct has properly been characterized as 'vicious' and rates extreme in the degree of culpability. The two are not mutually exclusive. Wanton conduct is reckless plus, so to speak.

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 879-80 (3d ed. 1982)." Black's Law Dictionary 1576 (7th ed. 1990).

³⁰ "[U]nreasonably burdensome or severe." Webster's Ninth New Collegiate Dictionary 828 (Merriam-Webster Inc. 1987).

³¹ "[C]haracterized by, based on, or done by fraud." *Id.* at 490. Fraud means "perversion of truth in order to induce another to part with something of value or to surrender a legal right." *Id.*

³² "[G]iven to, marked by, or arising from malice." *Id.* at 720. Malice means "desire to cause pain, injury, or distress to another." *Id.*

³³ "[G]oing beyond all standards of what is right or decent." *Id.* at 838.

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21

1 However, a party may, pursuant to a pretrial motion and after hearing before the
2 court, amend the pleadings to include a prayer for relief seeking punitive damages.
3 The court shall allow the motion to amend the pleadings if, after weighing the
4 evidence presented, the court concludes that, the moving party has established at
5 such hearing a reasonable likelihood of proving facts at trial sufficient to support
6 an award of punitive damages. A prayer for relief added pursuant to this section
shall not be barred by lapse of time under any applicable limitation on the time in
which an action may be brought or claim asserted, if the time prescribed or limited
had not expired when the original pleading was filed.

7 I.C. § 6-1604(1)-(2) (emphasis added). No Idaho cases interpret the new punitive damages
8 statute. The parties agree the new statute applies to this analysis. Therefore, it is against this
9 backdrop that the Court analyzed the Harrisons' Motions to Add Punitive Damages.

10 The parties introduced the following evidence both in support of the motions to amend
11 and in opposition to the motions.

12 Dr. Hartford obtained a license to practice medicine in 1987. He performed his residency
13 at St. Alphonsus, and then joined the staff at St. Alphonsus after he completed his residency. In
14 May 1995, Dr. Hartford's colleagues confronted him about his substance abuse with concerns
' about the treatment of his patients. After his colleagues confronted him, Dr. Hartford was
16 evaluated at Springbrook Northwest for drug and alcohol dependency. The evaluation indicated
17 Dr. Hartford suffered from alcohol and marijuana dependence and untreated depression.
18 Springbrook Northwest recommended Dr. Hartford undergo inpatient alcohol and drug
19 rehabilitation, but he refused to enter the program or participate in the Idaho Medical
20 Association's Physician's Recovery Network (PRN). The PRN is a "peer assistance entity" under
21 Idaho Code section 54-4401(2).

22 In December 1995, Dr. Hartford entered into his first Stipulation and Order with the Idaho
23 Board of Medicine. The stipulation provided that Dr. Hartford had "engaged in excessive
24 personal use of alcohol and controlled substances which might affect his ability to practice
25 medicine with reasonable skill and safety." The stipulation required him to submit to random
26 blood or urine screenings. The stipulation also required him to provide a copy of the Stipulation
27 and Order to all employers and the Chief of Staff of each hospital where he had, applied for, or
28 obtained privileges. According to the Harrisons, Dr. Hartford testified that he provided a copy of
29 the Stipulation and Order to St. Alphonsus.

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1 On March 1, 1996, Dr. Hartford tested positive for marijuana use. He also tested positive
2 for marijuana on July 17 and 29, 1996. On August 25, 1996, Dr. Hartford admitted to drinking
3 but refused to seek hospitalization. On September 16, 1996, the Board of Medicine suspended
4 Dr. Hartford's license for violating the Stipulation and Order.

5 Dr. Hartford entered into an Amended Stipulation and Order in March 1997. The
6 amended stipulation contained similar terms as the original stipulation, but it also required Dr.
7 Hartford to sign a contract with the PRN and comply with the terms of the contract. According to
8 the Harrisons, Dr. Hartford testified that he provided a copy of the amended stipulation to St.
9 Alphonsus.

10 Dr. Hartford tested positive for marijuana on July 18 and August 5, 1998. On September
11 25, 1998, the Board of Medicine suspended Dr. Hartford's license. According to the Harrisons,
12 St. Luke's and St. Alphonsus also suspended his privileges.

13 In January 1999, Dr. Hartford entered into a Second Amended Stipulation and Order.
14 According to the Harrisons, Dr. Hartford provided the stipulation to various parties including St.
Alphonsus. Dr. Hartford continues to remain under stipulation at the present time.

16 In late 1999 or early 2000, after Dr. Hartford's license suspension ended, Dr. Hartford
17 applied for privileges with St. Alphonsus, but St. Alphonsus required him to wait a year before it
18 would consider his application. According to St. Alphonsus, it wanted to determine whether Dr.
19 Hartford could comply with the Second Amended Stipulation and abstain from drugs and alcohol.

20 St. Alphonsus granted Dr. Hartford's application for privileges in 2001 and renewed his
21 privileges in 2003. According to St. Alphonsus, when Dr. Hartford initially reapplied for
22 privileges in 2001, he had not had any positive alcohol tests despite random PRN testing. When
23 Dr. Hartford submitted his renewal application in late February or early March of 2003, Sherry
24 Farnes believed she smelled alcohol on Dr. Hartford's breath. Ms. Farnes did not know Dr.
25 Hartford or his history of drug abuse and alcoholism. When she mentioned the issue with her co-
26 workers, they informed her that Dr. Hartford was being monitored by the PRN. She notified her
27 supervisors who then urged her to contact the PRN about her observations, which she did in an
28 email dated March 6, 2003.

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1 The PRN informed the Board of Medicine about Ms. Farnes observations. A PRN
2 chemical monitoring test, however, returned inconclusive results. The PRN also required Dr.
3 Hartford to obtain an alcohol evaluation from the Palmetto Institute (the "Palmetto Evaluation").
4 According to St. Alphonsus, the Board of Medicine allowed Dr. Hartford to retain his medical
5 license after the Palmetto Evaluation.

6 In the summer of 2003, the Board of Medicine temporarily suspended Dr. Hartford's
7 license as a result of a test that ended up being a false positive.

8 Mr. Harrison was admitted to St. Alphonsus in November 2003 for treatment of
9 hyponatremia. At the time Mr. Harrison was admitted, Dr. Hartford had privileges to practice at
10 St. Alphonsus and his license was no longer suspended. When Harrison was admitted to St.
11 Alphonsus the blood chemistry studies, showed he was suffering from severe chronic
12 hyponatremia and low potassium levels. He presented with nausea, vomiting, diarrhea, imbalance
13 and speech impairment. His blood alcohol was .13, nearly twice the legal limit. Ms. Anderson
14 testified she smelled alcohol on Dr. Hartford's breath during Mr. Harrison's treatment, and
15 brought it to the hospital staff's attention. However, she also testified that she did not think he was
16 intoxicated. In relevant part, Ms. Anderson testified as follows in her deposition:

17 Q. And that—did you have this conversation during that time out in
18 the hallway on November 15?

19 A. I believe so.

20 Q. During this conversation in the room and then outside in the
21 hallway, did you at any time suspect that Dr. Hartford had been using
22 alcohol?

23 A. Yes, I did.

24 Q. And tell me to the best of your recollection what you recall that
25 day.

26 A. When he first came in I could smell it on him. It wasn't like he had just
27 taken a drink, but like he had been drinking prior to, possibly the night before.
28 And I didn't say anything because it was a Saturday and I'm sure he didn't know
29 that he was going to be called into the hospital for something.

30 Q. Did he act intoxicated to you when you talked to him that day?

1 A. No. He was just kind of laid-back and asked questions and did his
2 exam of Ray. And it didn't seem like the whole process took very long. And then
3 he was gone.

4 BY MS. DUKE:

5 Q. Did you have any concerns at that point that Dr. Hartford wasn't
6 going to be able to, in your mind, adequately care for Mr. Harrison?

7 A. No, no.

8 ****

9 Q. What was your understanding when Dr. Hartford left that day as
10 to how your husband was going to be treated there at the hospital?

11 A. I thought he was going to be on the librium for a few days to help him
12 in case he had any withdrawals. And I thought within a week he would be out of
13 the hospital.

14 ****

15 Q. On Tuesday did you—well, I note on Exhibit No. 3 that you have
16 the word alcohol written by the 18th. What does that reference?

17 A. I thought I could smell alcohol on Dr. Hartford.

18 Q. And was that the same as—

19 A. No. It wasn't as predominant.

20 Q. Okay. So on Tuesday you didn't feel it was as predominant?

21 A. No.

22 Q. Correct?

23 A. No. I didn't feel it was.

24 Q. Okay. And again, did you feel that—you had described it earlier
25 when you testified that you smelled it on that Saturday, that you thought it
26 smelled old, stale. Was that again the same type of smell that you noticed that
27 day on Tuesday?

28 A. No.

29 BY MS. DUKE:

30 Q. Describe for me what you smelled?

31 A. I could just smell a faint smell of alcohol. Not that—not that he drank
right at that moment before he came in the office, or into the hospital, but that he
had had something to drink. It wasn't as predominant as it was on Saturday. On
Saturday it was like he'd been up partying real late Friday night.

And having been around people my entire life that are alcoholics, there is
an odor that comes through your pores. And even though you shower, or brush

1 your teeth, or no matter what you do, that odor is still there because it comes
2 through your pores because you've got so much in your system.

3 Tuesday morning it wasn't like that. It wasn't real strong like that.

4 **Q. And did you have any impression that that was in any way**
5 **impairing Dr. Hartford?**

6 **THE WITNESS:** I don't know if it impaired him or not. He didn't seem
7 to be concerned at all about the fact that Ray seemed weaker.

8 **BY MS. DUKE:**

9 **Q. But did you notice any behavior out of him that you would have**
10 **thought that he was intoxicated at the time?**

11 **A.** It seemed like every time he came into the hospital and visited with us
12 he was chewing gum. When I would step closer to talk to him—there were a few
13 times we stepped out in the hallway to talk about the labs because I didn't want to
14 get Ray upset about it. He was worried about what was happening to him. So
rather than cause him the stress, I talked to Harford, Dr. Hartford about it outside
the room. And when I would step closer to talk to him so that other people in the
hallway couldn't hear our conversation, he would back away from me, he turned
his head to the side talking to me instead of looking straight at me to talk.

15 **Q. Anything else you observed with respect to his behavior in talking**
16 **to you on that Tuesday?**

17 **A.** No.

18 **Q. On Tuesday did you talk to anybody about your impression that**
19 **Dr. Hartford had alcohol that you could smell?**

20 **A.** I mentioned something about a doctor coming into the hospital after
21 having had drinks and treating patients. And the nurse kind of turned away from
me and continued doing stuff for Ray and pretty much pretended like I didn't even
ask the question.

22 On another occasion—

23 **Q. Well, let's stop at that occasion. Then we'll go on to that next one**
24 **just so we can take them one by one.**

25 **Was that on Tuesday?**

26 **A.** Yes.

27 **Q. Okay. And was that after or before you had talked to Dr. Hartford**
28 **that day?**

29 **A.** It was after.

1 In December 2003, after Mr. Harrison was injured, St. Alphonsus informed the PRN of
2 Julie Anderson's claim that she smelled alcohol on Dr. Hartford's breath. The PRN tested Dr.
3 Hartford with a new "ethyl glucuronide" test that can identify whether the subject has been using
4 alcohol for longer period of time than urinalysis can. The test returned a positive result, and Dr.
5 Hartford admitted he had been drinking again.

6 In May 2004, the Board of Medicine held hearings and suspended Dr. Hartford's license
7 for six months and ordered that his license would be revoked for five years if he tested positive
8 for drugs or alcohol again. The Board of Medicine stayed the license revocation as long as he
9 abstained from drugs or alcohol. After the hearings, the hearing officer issued Proposed Findings
10 of Fact and Conclusion of Law and Proposed Order on behalf of the Board of Medicine. The
11 Proposed Finding found that although Dr. Hartford had been drinking and relapsed, he had
12 continued to practice as a competent physician. The Proposed Findings provided in part:

13 Based upon all the evidence and testimony in this record, the hearing officer finds
14 that Dr. Hartford's care and treatment of his patients throughout his nine-year
15 ordeal with the Board, has not been substandard or in violation of community
16 standards. In fact the testimony demonstrates that Dr. Hartford has maintained
17 excellent patient relations, provided quality care, and has somehow managed to
18 escape both patient complaints and/or complaints of fellow physicians regarding
19 his medical practice. Therefore the Board is not faced with a discipline case where
20 the physician has demonstrated a pattern of sub-standard care or of presenting an
21 endangerment to his patients. If the record demonstrated a pattern and practice of
22 sub-standard care or of endangerment to patients, then revocation of Dr. Hartford's
license [would] perhaps appear to be appropriate. However, it is respectfully
submitted that revocation is harsh, punitive, unwarranted, and unnecessary to
achieve the Board's appropriate role of protecting and preserving the public from
impaired and/or dangerous physicians.

23 (emphasis added). Additionally, the Harrisons provided no evidence that Dr. Hartford's drinking
24 ever affected his ability to care for his patients. None of the actions by the PRN or the Board of
25 Medicine arose from an incident where a patient had alleged Dr. Hartford's drinking had actually
26 led to substandard treatment.

27 After the six month license suspension ended, Dr. Hartford resumed his medical practice
28 and currently holds privileges at Walter Knox Hospital, Treasure Valley Hospital, and Council
29 Community Hospital.

30 ORDER DENYING MOTIONS TO AMEND RE: ST. ALPHONSUS
31 ORDER GRANTING MOTION TO ADD PUNITIVE DAMAGE CLAIM AGAINST HARTFORD
CASE NO: CVPI0400163D 27

1 The Harrisons hired Dr. Sterns as an expert in hyponatremia, and Dr. Sterns reviewed the
2 medical records. Dr. Sterns testified by affidavit that in his expert opinion, Dr. Hartford's
3 conduct fell well below the local standard of care and that Dr. Hartford should have been well
4 aware "of the substantial risk of severe and often irreversible CPM." Dr. Sterns also testified Dr.
5 Hartford should have realized and appreciated "such a rate of sodium increase created an
6 unreasonable risk of serious harm or death to Mr. Harrison and that a high degree of probability
7 existed that such harm would, in fact, occur to Mr. Harrison from such treatment." Dr. Sterns
8 concluded Dr. Hartford's "decision to allow Mr. Harrison's serum sodium to increase at a rate
9 over two times the minimum standard of care constituted a gross deviation from the local standard
10 of care . . . Dr. Hartford's conduct was grossly negligent and/or reckless and was a substantial
11 factor in causing Mr. Harrison's brain damage."

12 Based on the above, the Harrisons moved to amend their complaint to add a claim for
13 punitive damages against both St. Alphonsus for negligently allowing Dr. Hartford to practice at
14 St. Alphonsus and against Dr. Hartford for his negligent treatment of Mr. Harrison.

15 **A. The Court denies the Harrisons' Motion to Add Punitive Damages against St.
16 Alphonsus.**

17 The Harrisons claim for punitive damages against St. Alphonsus rests entirely on their
18 negligent credentialing claim and Dr. Hartford's substance abuse problems.

19 Given the Court's decision denying the Harrisons' Motion to Amend to add a claim for
20 negligent credentialing, the Court finds that with respect to St. Alphonsus, the Harrisons have not
21 established a "reasonable likelihood" of proving at trial by clear and convincing evidence an
22 extreme deviation from reasonable standards of conduct, and that the act of credentialing was
23 preformed with an understanding of or disregard for its likely consequences at trial. the
24 Harrisons' claim for punitive damages against St. Alphonsus relies on a cause of action for
25 negligent credentialing; a cause of action from which the Idaho Code immunizes hospitals from
26 liability. Moreover, even if the Court had granted the Harrisons' motion to amend to add a
27 negligent credentialing claim, having weighed the evidence both sides presented at the hearing,
28 the Court finds that the Harrisons did not establish a reasonable likelihood they could prove at
29 trial by clear and convincing evidence such credentialing was an extreme deviation from

1 reasonable standards of conduct. Therefore, in an exercise of discretion, the Court denies the
2 Harrison's Motion to Amend to Add a Claim for Punitive Damages Against St. Alphonsus.

3 **B. The Court grants the Harrison's Motion to Amend to Add a Claim for**
4 **Punitive Damages against Dr. Hartford.**

5 The Harrison's have not provided the Court with overwhelming evidence to support
6 potential punitive damages against Dr. Hartford, and the Court finds the question is close. While
7 the evidence presented suggests Dr. Hartford has a substance abuse problem, the Harrison's have
8 presented no evidence that this may have caused what they claim is malpractice. Julie Anderson's
9 testimony is neutral at best and they present no testimony that his drinking caused the injuries to
10 Mr. Harrison. The Harrison's, in fact, do not claim Dr. Hartford was inebriated throughout the
11 duration of Mr. Harrison's treatment. In fact, when presenting their position to the Court, the
12 Harrison's simply did not use Dr. Hartford's drug and alcohol use to support their claim of
13 punitive damages against him.

14 The only evidence relevant to whether they have a reasonable likelihood of proving Dr.
Hartford's conduct justified a punitive damage award is Dr. Sterns' testimony. More specifically,
16 Dr. Sterns' following testimony that:

- 17 1. Dr. Hartford's conduct fell well below the local standard of care, and
- 18 2. Dr. Hartford should have been well aware "of the substantial risk of severe and
often irreversible CPM," and
- 19 3. Dr. Hartford should have realized and appreciated "such a rate of sodium increase
20 created an unreasonable risk of serious harm or death to Mr. Harrison and that a
21 high degree of probability existed that such harm would, in fact, occur to Mr.
Harrison from such treatment," and
- 22 4. Dr. Hartford's "decision to allow Mr. Harrison's serum sodium to increase at a rate
23 over two times the minimum standard of care constituted a gross deviation from
24 the local standard of care . . . Dr. Hartford's conduct was grossly negligent and/or
reckless and was a substantial factor in causing Mr. Harrison's brain damage."

25 Based on that testimony, the Court finds that a jury could ultimately determine Dr.
26 Hartford's conduct was outrageous. Therefore, the Court finds the evidence demonstrates the
27 Harrison's have a "reasonable" likelihood of proving facts by clear and convincing evidence at
28 trial sufficient to support an award of punitive damages and, thus, in an exercise of discretion, the

30 **ORDER DENYING MOTIONS TO AMEND RE: ST. ALPHONSUS**
31 **ORDER GRANTING MOTION TO ADD PUNITIVE DAMAGE CLAIM AGAINST HARTFORD**
CASE NO: CVPI0400163D

1 Court grants the Motion to Amend to Add a Claim for Punitive Damages Against Dr. Hartford.
2 I.C. § 6-1604(2).

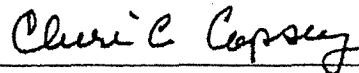
3 However, because the Harrisons have not provided strong evidence, this ruling contains a
4 caveat. Before the Harrisons may put a claim for punitive damages before the jury, and before the
5 Harrisons rest their case in chief, they must again request that they be allowed to go forward with
6 their claim for punitive damages against Dr. Hartford. The Court at that time will determine
7 whether they have presented enough evidence in the record to take their claim to the jury.

8 **CONCLUSION**

9 Based on the above reasoning, the Court hereby denies the motions to amend to add
10 punitive damages and negligent credentialing claims against St. Alphonsus. The Court further
11 grants the Motion to Amend to Add Punitive Damages against Dr. Hartford.

12 **IT IS SO ORDERED.**

13 Dated this 18th day of May 2006.
14



16 Cheri C. Copsey
17 District Judge
18
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30

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May 2006, I mailed (served) a true and correct copy of the within instrument to:

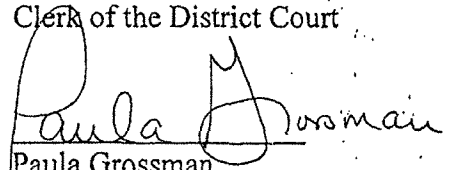
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Clerk of the District Court


Paula Grossman
Deputy Clerk

ORDER DENYING MOTIONS TO AMEND RE: ST. ALPHONSUS
ORDER GRANTING MOTION TO ADD PUNITIVE DAMAGE CLAIM AGAINST HARTFORD
CASE NO: CVPI0400163D

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Attorneys for Defendant West Valley Medical Center

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A.M. 4:45 P.M.

NOV 13 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of
Maria A. Aguilar, deceased, and as the
natural father and guardian of GUADALUPE
MARIA AGUILAR, [REDACTED]
AGUILAR, and [REDACTED] AGUILAR,
minors, and JOSE AGUILAR, JR., heirs of
Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., MITCHELL LONG, D.O.,
COLUMBIA, WEST VALLEY MEDICAL
CENTER, and Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation,
and PRIMARY HEALTH CARE CENTER,
an Idaho corporation, JOHN and JANE
DOES I through X, employees of one or more
of the Defendants,

Defendants.

Case No. CV 05-5781

**WEST VALLEY MEDICAL
CENTER'S OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT**

COMES NOW defendant, West Valley Medical Center, ("West Valley"), by and through its counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and opposes plaintiffs' "Motion for Leave to Amend Complaint to More Specifically Set Forth Allegations of Agency and Non-Delegable Duty Against Defendants West Valley Medical Center, Mercy Medical Center and Primary Health Care Center" on the ground that plaintiffs' proposed allegations fail to state a valid claim.

INTRODUCTION

Decedent was brought to the emergency room at West Valley on June 4, 2003, in full cardiac arrest. She was treated by Dr. Newman, the emergency room physician, but later died from an embolism. *See* Plaintiffs' Complaint and Demand for Jury Trial, filed June 2, 2005. At the time of decedent's death, Dr. Newman was affiliated with West Valley Emergency Physicians, P.A. who had an independent contract with West Valley to provide emergency room services. *See* Affidavit of Kathy Moore filed in support hereof.

Plaintiffs filed their original Complaint and Demand for Jury Trial on June 2, 2005, and West Valley accepted service on October 6, 2005.¹ Plaintiffs now seek to amend their complaint to include additional allegations against West Valley claiming it accepted a non-delegable duty by providing emergency services and is liable under the theories of *respondeat superior*, apparent agency, and other theories of vicarious liability for the activities of defendant Steven R. Newman, M.D. *See* Plaintiffs' Proposed Amended Complaint, Count VI, ¶ 34. However, Idaho appellate courts have not adopted the theories which plaintiffs have chosen to pursue against West Valley in their amended complaint; therefore, plaintiffs' motion to amend their complaint must be denied.

¹ Litigation in this case was stayed pending completion of the pre-litigation screening process.

ARGUMENT

The trial court has discretion under Rule 15(a), Idaho R. Civ. P., to deny a motion to amend a complaint if the new allegations proposed to be inserted in the amended complaint fail to state a valid claim. *State, ex rel. Wasden v. Daicel Chemical Industries, Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005). *Estate of Becker v. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900 (1991). "If the amended pleading does not set out a valid claim, . . . it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Black Canyon*, at 175, 804 P.2d at 904. Plaintiffs' proposed amended allegations against West Valley, which include the theories of non-delegable duty, *respondent superior*, and apparent agency, fail to state a valid claim because Idaho appellate courts have not adopted the plaintiffs' theories as being applicable to hold a hospital liable for the negligence of a physician who is an independent contractor. Therefore, plaintiffs' motion to amend their complaint as against West Valley should be denied.

A. Non-Delegable Duty.

In Count VI, ¶ 34 of plaintiffs' proposed amended complaint, they claim that West Valley accepted a non-delegable duty and remain responsible for the activities of Dr. Newman, a physician who independently contracts with West Valley to provide emergency room coverage. In support of their claim, plaintiffs' cite to Idaho Code § 39-101, *et seq.*; Idaho Code § 39-1301(a) and IDAPA § 16.03.14, *et seq.* However, plaintiffs do not pinpoint where in those citations language can be found to support their claim that West Valley accepted a non-delegable duty which makes it liable for the conduct of an independent contractor.

The Idaho Department of Health and Welfare promulgated rules and regulations regarding licensing and construction of hospitals. Its ability to make rules regulating hospitals

stems from Idaho Code § 39-1301, *et seq.* Idaho Code § 39-1302, specifies that the purpose of Idaho statutes on hospital licensing is to:

provide for the development, establishment, and enforcement of standards

(1) for the care and treatment of individuals in facilities or by agencies as defined, and

(2) for the construction, maintenance and operation of facilities or agencies as defined which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in facilities or by agencies as defined.

I.C. § 39-1302. Further, Idaho Code § 39-1307 provides that “the board shall have the authority to adopt, amend, and enforce rules and regulations and standards consistent with the provisions of this act which are designed to protect the health and safety of patients being cared for in facilities or agencies as defined.”

Assigning liability for negligence among the hospital versus the doctor has nothing to do with these purposes. Whether a hospital is vicariously liable for the negligence of doctors has nothing to do with the health and safety of patients while they are in the hospital. Although the legislature indisputably has the power to legislate changes in tort liability among various entities, there is no indication from the applicable statutes that it intended to do so in this case. In fact, there are indications to the contrary.

Idaho Code § 39-1353a specifically provides that “[a]nything to the contrary hereinabove notwithstanding, this act shall not be construed to permit or authorize any hospital district or hospital therein in the state of Idaho directly or indirectly to engage in the practice of medicine....” Assigning liability for doctors’ negligence to hospitals, if indeed that is the purpose of IDAPA 16.03.14. *et seq.*, is completely inconsistent with this law. Holding that hospitals have a non-delegable duty to practice safe emergency medicine makes no sense in light

of the fact that hospitals *cannot* practice medicine. This fact has been recognized by the Idaho legislature in Idaho Code § 39-1353a.

The legislature is vested with the power to extend the reach of medical malpractice liability to render hospitals liable for the conduct of its independent contractors. "The power to make law and declare public policy is vested with the legislature." *Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 825, 41 P.3d 242, 253 (2001). The legislature unequivocally set forth that hospitals are not permitted to practice medicine and, therefore, a hospital cannot be held liable for negligence resulting from the practice of medicine.

Several jurisdictions have declined to apply the non-delegable duty doctrine to hospitals that contract with emergency room doctors, as should this Court. In *Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998), the Texas Supreme Court held that imposing such a duty is not necessary to safeguard patients in hospital emergency rooms because patients have a cause of action against the negligent physician. The Court of Appeals in Missouri also refused to apply the non-delegable duty doctrine with regard to emergency room physicians who were independent contractors. *Kelly v. St. Luke's Hospital of Kansas City*, 826 S.W.2d 391 (Mo. Ct. App. 1992). There the court found no non-delegable duty existed since Missouri state regulations regarding publicly licensed hospitals did not mandate a purported non-delegable duty for maintenance of its emergency room. See also *Sanchez v. Medicorp Health System*, No. CL03-221, 2004 WL628209 *2 (Va. Cir. Ct. 2004) ("This court is persuaded that no such novel and broad application [in the context of a hospital and emergency room personnel] of the "non-delegable duty" exception is recognized in Virginia."). The reasoning of these jurisdictions is sound and was aptly summed up by the Texas Supreme Court when it observed that creation of a non-delegable duty in this context would impose liability on a hospital solely

because it opens its doors for business. *Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945, 948-49 (Tex. 1998).

In the present case, there is no reason for this Court to stretch and find that West Valley had a non-delegable duty. Plaintiffs have sufficient remedies against Dr. Newman, individually, and against West Valley for any breach of its duty owed directly to the patient. Idaho appellate courts have not adopted the application of a non-delegable duty arising from the statutes, rules and regulations to hold hospitals liable in this particular concept. Therefore, the legislature did not intend that hospitals could be liable for malpractice. The proof of which can be found in the statute quoted above. Plaintiffs' amended allegation against West Valley fails to state a valid claim that West Valley had a non-delegable duty with which to find it liable for Dr. Newman's conduct.

B. *Respondeat Superior* Liability.

The doctrine of *respondeat superior* imposes tort liability on an employer for its employees, but not for the negligent acts of an independent contractor. *Sanchez v. Medicorp Health Systems*, 618 S.E.2d 331, 334 (2005); *Daly v. Aspen Center for Women's Health, Inc.*, 134 P.3d 450 (Colo. App. 2005).

The theory of *respondeat superior* stands for the proposition that an employer who is not liable because of his own acts can be held liable for the wrongful acts of his employees. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 148 (Ind. 1999); Prosser and Keeton on the Law of Torts §§ 69-70 (5th Ed. 1984). An employer may be vicariously liable for the tortious actions of an employee through the doctrine of *respondeat superior*. Under this doctrine, "an employer or master is responsible for the torts of its employee or servant when the torts are committed within the scope of the employee's or servant's employment." *Rausch v. Pocatello Lumber Company, Inc.* 135 Idaho 80, 83-84, 14 P.3d 1074, 1077-78 (Ct. App. 2000). In this context the employee

and employer are often identified as servant and master. One important factor in applying *respondeat superior* is differentiating between those who are servants or employees and those who are independent contractors. *Sword* at 148. A servant is under the control of the master; an independent contractor is not. Prosser and Keeton on the Law of Torts § 71 (5th Ed. 1984). It is important to distinguish between servants and independent contractors in the tort context because, while a master can be liable for a servant's negligence, a master cannot be held liable for an independent contractor, over whom he has no control. Restatement (Second) Torts § 409. The theory behind non-liability for independent contractors is that it would be unfair to hold a master liable for the conduct of another when the master has no control over that conduct. *Id.* at Comment b.

Since West Valley did not employ or have control over Dr. Newman, it cannot be held liable for his conduct under the doctrine of *respondeat superior*; therefore, plaintiffs' amended allegation against West Valley fails to state a valid claim with which to find it liable for Dr. Newman's conduct.

C. Apparent Agency.²

In Idaho, apparent agency claims have not been extended beyond contract cases. *Landvik v. Herbert*, 130 Idaho 54, 58-59, 936 P.2d 697, 701-02 (Ct. App. 1997). No Idaho appellate opinion has ever used apparent authority or agency to create vicarious tort liability in the absence of an actual employment or agency relationship. In *Landvik*, the Idaho Court of Appeals discussed the development of the doctrine of apparent authority:

² West Valley acknowledges that the theories of apparent agency and apparent authority are different concepts under agency law; however, the two concepts are often used interchangeably. For the purposes of this memorandum, West Valley will not distinguish between the two, instead reserves the right to provide supplemental briefing if the Court wishes.

The doctrine of apparent authority arose in the arena of contract law and addresses circumstances in which an agent, acting without actual authority, may nonetheless bind the principal to a contract entered into by the agent with a third party. . . . Neither this court nor the Idaho Supreme Court has applied the doctrine of apparent authority to a claim that a principal is liable for injuries resulting from the agent's tortious conduct, [although] [s]ome jurisdictions . . . have.

Id.

Judge Ronald J. Wilper, District Judge in Ada County, on September 1, 2006, relying upon *Landvrik*, declined to extend the apparent agency theory in a tort context to find a hospital liable for the negligent conduct of independent contractors. *Jones v. Anesthesiology Consultants of Treasure Valley, Inc.*, CV PI 0400486D, Ada County, Boise, Idaho, a copy of which is attached hereto as Exhibit "A" to the Affidavit of Portia Jenkins, filed contemporaneously herewith. Judge Wilper, held that "[t]he fact that apparent agency claims have not been extended beyond contract cases leads this Court to conclude that Idaho does not recognize a tort claim against a hospital based on the actions of independent contractors that may be considered apparent agents of the hospital. *Id.* at 7. Other states have also declined to extend the doctrine of apparent authority/agency to tort contexts. See, e.g., *Mullen v. Horton*, 700 A.2d 1377 (Conn. App. 1997); *Beach v. Jean*, 746 A.2d 228 (Superior Court of Connecticut, 1999); *Lovell v. Sonitrol of Chattanooga, Inc.*, 674 S.W.2d 728 (Tenn. Ct. App. 1984).

The Virginia Supreme Court specifically declined to extend the theory of apparent agency to cover tort claims against hospitals, reasoning that those jurisdictions who had extended the apparent agency theory to hospitals in the tort context had done so because they had already extended the use of apparent agency theory beyond the contract realm in other contexts. *Sanchez v. Medicorp Health System*, 618 S.E.2d 331, 335 (2005). Other jurisdictions have declined to apply apparent agency to hospitals using the rationale that hospitals themselves do not practice medicine. See *Austin v. Litvak*, 682 P.2d 41, 53 (Colo. 1984) (holding that hospital cannot be

liable for doctor's negligence because the hospital cannot practice medicine); *Tolman v. IHC Hospitals, Inc.*, 637 F. Supp. 682, 684 (D. Utah 1986) (finding that hospitals do not practice medicine). The Idaho Federal District Court also found that hospitals do not practice medicine and cannot be held liable for a doctor's malpractice. *Keyser v. St. Mary's Hospital, Inc.*, 662 F. Supp. 191, 193 (D. Idaho 1987).

The Idaho Supreme Court's rejection of finding that the theory of apparent agency/authority applies to tort liability must be followed in the present case, just as Judge Wilper followed it in *Jones v. Anesthesiology Consultants of Treasure Valley*. Since the Idaho appellate courts have not extended the apparent agency theory to apply in the tort context, plaintiffs' amended allegation against West Valley fails to state a valid claim with which to find it liable for Dr. Newman's conduct.

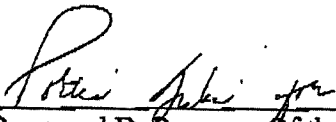
CONCLUSION

Based on the foregoing arguments, West Valley respectfully requests that plaintiffs' motion to amend their complaint be denied.

DATED this 13th day of November, 2006.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By


Raymond D. Powers - Of the Firm
Attorneys for Defendant
West Valley Medical Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November, 2006, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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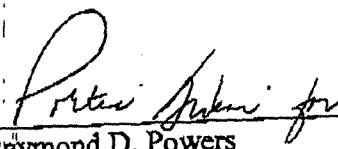
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Attorneys for Defendant West Valley Medical Center

FILED
A.M. 4:55 P.M.

NOV 13 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of
Maria A. Aguilar, deceased, and as the
natural father and guardian of GUADALUPE
MARIA AGUILAR, [REDACTED]
AGUILAR, and [REDACTED] AGUILAR,
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Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., MITCHELL LONG, D.O.,
COLUMBIA WEST VALLEY MEDICAL
CENTER, and Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation,
and PRIMARY HEALTH CARE CENTER,
an Idaho corporation, JOHN and JANE
DOES I through X, employees of one or more
of the Defendants,

Defendants.

Case No. CV 05-5781

**AFFIDAVIT OF PORTIA JENKINS
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT**

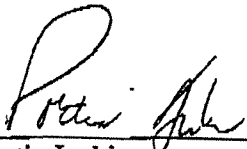
STATE OF IDAHO)
) ss.
County of Ada)

PORTIA JENKINS, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for West Valley Medical Center, defendant in the above-entitled action, and, as such, have personal knowledge of the facts set forth herein.

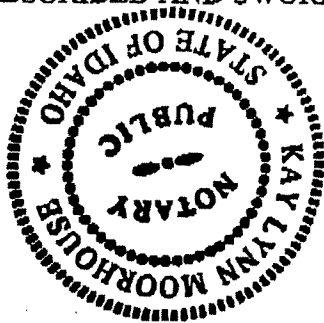
2. Attached hereto as Exhibit "A" is a true and correct copy of "Memorandum Decision and Order," Case No. CV PI 0400486D, Ada County, Boise, Idaho, *Jones v. Anesthesiology Consultants of Treasure Valley, PLLC*.

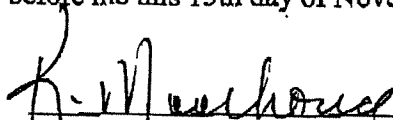
FURTHER YOUR AFFIANT SAYETH NAUGHT.



Portia Jenkins

SUBSCRIBED AND SWORN TO before me this 13th day of November, 2006.





Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 9/16/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2006, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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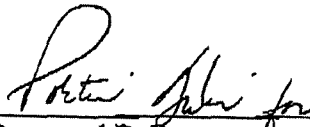
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Raymond D. Powers

EXHIBIT A

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DISTRICT COURT

NO. _____
FILED _____
AM. _____ P.M. 3:57

SEP - 1 2006

J. DAVID NAVARRO
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL ANTHONY JONES,
individually and as guardian ad litem for[REDACTED] LYNN
ROYER, as natural mother of LORI
MARIE JONES, deceased, and KIM
ROYER, as step-father of LORI MARIE
JONES, deceased, wife and husband, and
HAROLD BOWERS,

Plaintiffs,

vs.

Case No. CV PI 0400486D

**MEMORANDUM DECISION AND
ORDER**ANESTHESIOLOGY CONSULTANTS
OF TREASURE VALLEY, PLLC,
DEBORAH JENKINS, M.D., THOMAS
LARK, M.D., B&B
AUTOTRANSFUSION SERVICES,
INC., an Idaho corporation,
HEATHSOUTH TREASURE VALLEY
HOSPITAL, HAEMONETICS
CORPORATION, a Massachusetts
corporation, and JOHN DOES I through
V,

Defendants.

I. PROCEEDINGS

This matter came before the Court on the Defendant Treasure Valley Hospital's Motion for Summary Judgment; Plaintiffs' Cross Motion for Summary Judgment; Defendant Treasure Valley Hospital's Motion to Strike (1) Plaintiff Royer's Cross Motion for Summary Judgment and Memorandum in Support of Cross Motion for Summary Judgment and Opposition to Defendant's

1 Motion for Summary Judgment, (2) Plaintiff Jones' Cross Motion for Summary Judgment, and (3)
2 Plaintiff Bowers' Notice of Joinder in Opposition to Defendant's Motion for Summary Judgment
3 and the Cross Motion for Partial Summary Judgment; and Plaintiffs' Motion to Shorten Time to
4 Hear the Cross Motion for Summary Judgment. The Court heard oral arguments on the motions on
5 August 31, 2006, and took the matter fully under advisement at that time.

6 II. BACKGROUND

7 This case involves the death of Plaintiffs' decedent at Treasure Valley Hospital (TVH) on or
8 about the August 2, 2004, following the alleged negligence of employees or agents of Anesthesiology
9 Consultants of Treasure Valley as well as B&B Autotransfusion Services.

10 The services provided by Defendant Anesthesiology Consultants of Treasure Valley (ACTV)
11 and its employees as well as the services provided by Defendant B & B Autotransfusion (B&B) and
12 its employees are performed under independent contracts those entities have with Defendant Treasure
13 Valley Hospital. The fact that these entities are independent contractors has not been challenged.
14 The Plaintiffs assert that these independent contractors had the apparent authority or were the
15 apparent agents of Defendant TVH and that TVH should therefore be held liable for the negligence of
16 the independent contractors and their employees.

17 On August 1, 2006, Defendant TVH moved for Summary Judgment claiming that the
18 Plaintiffs had not established by expert testimony, as required in Idaho, that they had breached the
19 local standard of care for a hospital. On August 9, 2006 Plaintiff Royer filed a cross motion
20 requesting summary judgment on the issue of apparent agency and opposing the Defendant's motion
21 for summary judgment. Both Plaintiff Jones and Plaintiff Bowers joined in these arguments.

22 Defendant TVH then moved to strike the Cross Motion for Summary Judgment and the
23 arguments opposing Defendant TVH's Motion for Summary Judgment based on claims of apparent
24 agency since, first, the amended complaint did not sufficiently plead such a theory of liability and,
25 second, the hearing for the Cross Motion was scheduled in violation of Rule 56(c) and that, with
26

1 respect to Plaintiff Bowers, the filing violated the Court's scheduling order. Plaintiffs filed their
2 Motion to Shorten Time.

3 Defendant TVH's Motion to Strike For Lack of Timely Filing &

4 Plaintiff's Motion to Shorten Time

5 Defendant TVH claimed that the Plaintiffs did not specifically comply with LR.C.P. 56(c)
6 when filing their motions for summary judgment and requesting hearings on said motions.
7 Additionally, TVH moved to strike Plaintiff Bowers' Notice of Joinder due to the failure to adhere to
8 the Court's scheduling order by filing its Notice of Joinder in the Cross Motion for Summary
9 Judgment one day after the expiration of the deadline imposed by the Court for filing such motions.¹

10
11 Rule 56(c) requires the moving party to serve the motion along with supporting brief
12 and affidavits not less than twenty-eight days before the hearing. LR.C.P. 56(c). The
13 purpose is to give the opposing party an adequate and fair opportunity to support its
14 case. The rule requires the adverse party, if it chooses, to respond with an opposing
15 brief and affidavits no less than fourteen days prior to the hearing. *Id.* Again, the
16 purpose is to give the moving party an adequate opportunity to respond. Finally, if the
17 moving party chooses to reply, the rule permits the service of a reply brief no fewer
18 than seven days before the hearing. *Id.* While the above language is mandatory, the
19 trial court may shorten the time periods for good cause shown. *Id.*

20 *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 5, 981 P.2d 236, 240 (1999)
21 (emphasis added).

22 Whether or not a party has demonstrated good cause under Rule 56(c) is a matter within the
23 discretion of the Court. *See, e.g., Farrell v. Board of Com'rs, Lemhi County*, 138 Idaho 378, 391, 64
24 P.3d 304, 317 (2002).

25 The Plaintiffs have demonstrated good cause to shorten time to hear their Cross-Motion for
26 Summary Judgment on August 31, 2006. On August 8, 2006, Plaintiff Royer's attorney contacted
27 Defendant TVH's attorney regarding the scheduling of Plaintiff Royer's Cross Motion for Summary

¹ The Court set a deadline of September 6, 2006 for hearing such motions. Therefore, all motions needed to be filed by
August 9, 2006 to be in compliance with both the Scheduling Order and Rule 56(c).

1 Judgment. Plaintiff was prepared and able to schedule the motion for hearing on September 6, 2006,
2 a date that would comply with both Rule 56(c) and the Court's scheduling order. However, Plaintiff
3 became aware of the Judge's scheduled absence in early September and asked Defendant TVH if a
4 hearing could be scheduled on August 31, 2006 despite the fact that it would be beyond the deadline of
5 Rule 56(c). Although Defendant TVH's attorney did not agree to the request, he did acknowledge it,
6 and until receiving the Motion to Strike, Plaintiff Royer's attorney assumed that the hearing date
7 would be acceptable. Additionally, the Defendant has not demonstrated any prejudice in hearing the
8 motion earlier than required by 56(c), especially considering the fact that the substance of the Cross-
9 Motion for Summary Judgment covers the same legal grounds as the Defendant's own Motion for
10 Summary Judgment. The facts that the Plaintiff would have been able to schedule a hearing in
11 compliance with Rule 56(c) but for the Court's absence on September 6, 2006 and that Defendant
12 TVH suffered no prejudice by scheduling the hearing on the cross motion for summary judgment,
13 leads the Court to find good cause for excusing strict compliance with Rule 56(c).

14 Plaintiff Bowers' Notice of Joinder was filed on August 10, 2006. The Court's scheduling
15 order required all motions to be heard by September 6, 2006. Therefore, to be in compliance with
16 Rule 56(c), all motions should have been filed by August 9, 2006. However, the Court had retained
17 the power to alter the scheduling order for good cause at the discretion of the Court. Moreover, the
18 Court has the power to award summary judgment for any party, even a party that has not filed a
19 motion. *See Brummett v. Ediger*, 106 Idaho 724, 726, 682 P.2d 1271, 1273 (1984) ("Summary
20 judgment may be rendered for any party, not just the moving party, and on any or all of the causes of
21 action involved, under the rules of civil procedure."). Plaintiff Bowers did not add any arguments to
22 the Cross Motion for Summary Judgment filed by Plaintiff Royer. The Court would be empowered to
23 grant the motion for all plaintiffs based on the motion by a single plaintiff. Therefore, the Motion to
24 Strike Bowers' Notice of Joinder is moot since the Cross Motions for Summary Judgment filed by the
25 other two Plaintiffs have been accepted as timely.

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1 Defendant TVH's Motion to Strike based upon the untimely filing of Plaintiffs' Cross Motion
2 for Summary Judgment and notices of joinder thereto are hereby denied. Plaintiff's Motion to
3 Shorten Time is granted.

4 **Defendant TVH's Motion to Strike For Failure to Plead Apparent Agency**

5 Defendant TVH argued that, "Plaintiffs' use of the words 'agents' or 'representatives' was not
6 enough to put TVH on notice that they were pursuing a claim of apparent authority to hold TVH
7 liable for the conduct of [the other Defendants]." ¹ Defendant TVH argued that the Plaintiffs'
8 complaints raised vicarious liability issues, but not apparent agency issues and therefore their
9 complaints were not sufficient. The Plaintiffs did meet the standard of pleading applicable in Idaho.

10 Idaho has adopted a system of notice pleading. *Cook v. Skyline Corp.*, 135
11 Idaho 26, 33, 13 P.3d 857, 864 (2000) (citation omitted); I.R.C.P. 8(a)(1). Thus, a
12 pleading "which sets forth a claim for relief ... need only contain 'a short and plain
13 statement of the claim showing that the pleader is entitled to relief,' in addition to
14 alleging jurisdiction of the court and a demand for judgment..." *Id.* (citations
15 omitted). Under notice pleading, "a party is no longer slavishly bound to stating
16 particular theories in its pleadings." *Id.* (quoting *Dursteler v. Dursteler*, 108 Idaho
230, 697 P.2d 1244 (Ct.App.1985), *later proceeding*, 112 Idaho 594, 733 P.2d 815
14 (Ct.App.1987)). Rather, a complaint need only state claims upon which relief may be
15 granted. *Id.*; I.R.C.P. 8(a)(1).

16 *Zattiero v. Homedale School Dist. No. 370*, 137 Idaho 568, 571, 51 P.3d 382, 385 (2002).

17 Defendant TVH claimed that it had no notice that a claim based on agency was being asserted
18 by the Plaintiffs, despite the fact that the complaints of all three Plaintiffs referred to the negligence of
19 any "agents" of Defendant TVH. Indeed, Plaintiff Royer's complaint specifically refers to liability
20 based on a theory of *respondeat superior*. The Defendant was put on notice that a claim of agency
21 was being asserted by at least one Plaintiff (Royer) and should have realized the claims were being
22 asserted by the other Plaintiffs as well.²

23 ¹ TVH's Reply to Opposition to TVH's Motion for Summary Judgment, p.11.

24 ² In fact, Plaintiffs present emails between attorneys Foster and Janis discussing the fact that they had brought up the
25 apparent agency claim in conversations with the Defendant's counsel. Aff. Foster, Aug. 21, 2006, Ex. C. Also the
26 interrogatories and requests for production of documents posed by Plaintiff Jones to Defendant TVH clearly request

1 A complaint that refers to the *negligence* of the hospital can sufficiently raise the issue of
2 apparent agency. *See, e.g., Gilbert v. Frank*, 233 Ill.App.3d 372, 376-77, 599 N.E.2d 143 (Ill. App. 2
3 Dist. 1992), *aff'd Gilbert v. Sycamore Mun. Hosp.*, 622 N.E. 2d 788, 796 (1993) (finding that
4 complaint put defendant on notice of apparent agency claim even though complaint alleged vicarious
5 liability due to doctor's negligence). The Court finds that the claim based on apparent agency has
6 been sufficiently pled by all three Plaintiffs. The Motion to Strike the Cross Motion for Summary
7 Judgment for failure to sufficiently plead apparent agency as a theory of vicarious liability is denied.

8 **Defendant TVH's Motion for Summary Judgment**

9 Defendant TVH brings this motion based on the failure of the plaintiffs to establish an element
10 of their case, specifically the failure to establish via expert testimony that the hospital breached any
11 applicable standard of care. The Plaintiffs counter that the claim is based on the fact that the *agents*
12 of the hospital were negligent and therefore the hospital can be found liable under *respondeat*
13 *superior*. Defendant TVH argues that (1) the Plaintiffs have not pleaded an agency theory, but rather
14 have asserted that Defendant TVH was itself negligent, and (2) even if the Plaintiffs are found to have
15 pled agency as a basis for liability, the Plaintiffs have not presented any evidence establishing the
16 elements of the claim of apparent agency.

17 ***Defendant's Motion for Summary Judgment Based on the Sufficiency of the Complaint***

18 This issue was discussed above. The pleadings of each Plaintiff are sufficient to put
19 Defendant TVH on notice of the claim based on apparent agency liability.

20 ***Summary Judgment – Apparent Agency in Idaho***

21 Idaho recognizes the viability of apparent agency as a legal theory, however its application has
22 thus far been limited to cases involving contracts. *See Landvik v. Herbert*, 130 Idaho 54, 58-59, 936

23
24 information bearing on an apparent agency claim, specifically whether or not any person at TVH had told the decedent
25 that the anesthesiologists were not in fact employees of TVH. *Aff Janis*, Aug. 23, 2006, Ex. A, p.9-14. These
26 interrogatories were sent to Defendant TVH on or about May 1, 2006. On May 25, 2006, answers to these requests were
sent by Defendant TVH to Plaintiffs.

1 P.2d 697, 701-02 (Ct. App. 1997) ("Neither this Court nor the Idaho Supreme Court has applied the
2 doctrine of apparent authority to a claim that a principal is liable for injuries resulting from the agent's
3 tortious conduct.").

4 *Idaho has not Extended Apparent Agency Liability to Tort Claims*

5 The fact that apparent agency claims have not been extended beyond contract cases leads this
6 Court to conclude that Idaho does not recognize a tort claim against a hospital based on the actions of
7 independent contractors that may be considered apparent agents of the hospital.¹ This reasoning was
8 employed recently by the Virginia Supreme Court. In *Sanchez v. Medicorp Health System*, the
9 Virginia Supreme Court declined to extend the theory of apparent agency to cover tort claims against
10 hospitals. *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 307, 618 S.E.2d 331, 335 (2005). The
11 Virginia Court recognized that many jurisdictions were beginning to allow such claims,² but found
12 that those jurisdictions had already extended the use of apparent agency liability beyond the contract
13 law realm. *Id.* Since Virginia, like Idaho, had not extended apparent agency liability to cover tort
14 claims, the Virginia Supreme Court declined to follow the trend of allowing injured persons to sue
15 hospitals under an apparent agency theory.

16 Colorado and Utah have declined to extend apparent agency liability to tort claims against
17 hospitals based on the fact that hospitals themselves do not practice medicine. See *Austin v. Litvak*,
18 682 P.2d 41, 53 (Colo. 1984) (finding that hospital cannot practice medicine and therefore cannot be
19

20 ¹ The Supreme Court has, in dicta, stated that:

21 There are three separate types of agency, any of which are sufficient to bind the principal to a contract
22 entered into by an agent with a third party, and make the principal responsible for the agent's *tortious*
23 acts, so long as the agent has acted within the course and scope of authority delegated by the principal.

24 The three types of agencies are: express authority, implied authority, and apparent authority.
25 *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985) (emphasis added).

26 However, the Bailey case was a breach of contract matter. The *Landvik* court correctly stated that the Idaho Supreme
Court has never *applied* apparent agency of authority liability in a tort action.

² At least twenty two jurisdictions have allowed injured persons to sue hospitals under apparent agency liability claims.
See John D. Hobson, *Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon*, 51 A.L.R. 4th 235
(Westlaw 2006).

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1 held liable for negligence of the doctor); *Tolman v. IHC Hospitals, Inc.*, 637 F. Supp. 682, 684 (D.
2 Utah 1986) (agreeing with logic of *Litvak* that hospitals do not practice medicine). Interpreting Idaho
3 law, the U.S. District Court for Idaho has also held that hospitals cannot be held liable for the
4 negligent acts of a doctor who was not an employee of the hospital. *Keyser v. St. Mary's Hosp., Inc.*,
5 662 F. Supp. 191, 193 (D. Idaho 1987) (stating that "hospitals cannot practice medicine.... [t]he
6 Hospital cannot be liable for any malpractice of [a doctor] (unless he acted as an employee)...."). The
7 Court finds this reasoning persuasive.

8 The power to extend the reach of medical malpractice liability in order to render hospitals
9 liable for the acts of independent contractors is properly vested in the legislature. As the Idaho
10 Supreme Court has stated:

11 The power invested to this Court is limited to interpretation of the constitution
12 and laws and their application to the factual situations presented by the cases that come
13 before the Court. *See Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260
(2000) ("[I]t is not for this Court, *nor any court*, to make or change the law, but to
interpret the law as enacted by the legislative branch.").

14 The power to make law and declare public policy is vested with the legislature.
15 This Court will not intrude upon the province of the legislature.

16 *Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 825, 41 P.3d 242, 253 (2001) (emphasis
17 added).

18 For the reasons set forth above, the Court declines to extend the doctrine of apparent agency to
19 encompass tort claims.¹ Therefore TVH's Motion for Summary Judgment is granted. Accordingly,
20 the Cross Motion for Summary Judgment submitted by the Plaintiffs is denied.

21 IV CONCLUSION

22
23 ¹ At Oral arguments, counsel for Plaintiff Bowers contended that a contract existed between Defendant TVH and the
24 decedent, making it possible to apply apparent agency liability. The Court disagrees. *See Trimming v. Howard*, 52 Idaho
25 412, 416, 16 P.2d 661 (1932) ("The gist of a malpractice action is negligence, not a breach of the contract of
employment.... The original injury, be it caused by carelessness, negligence, misconduct or whatnot, remains the sole
cause of action; and the action is one in tort and not for a breach of contract."). (citations omitted).

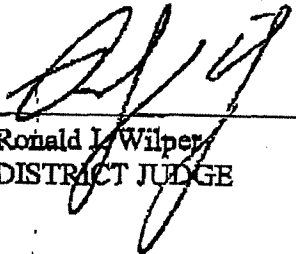
1 The Motion to Shorten Time to hear the Plaintiffs' Cross Motion for Summary Judgment is
2 hereby granted as the Plaintiffs have established good cause for the Court to do so. Accordingly, the
3 Motion to Strike the Cross-Motion for Summary Judgment and any notices of joinder thereto due to
4 being untimely filed is denied.

5 The Motion to Strike the Cross Motion for Summary Judgment based on the fact that apparent
6 agency had not been pleaded in the complaint and therefore could not be the subject of a summary
7 judgment motion is denied.

8 The Court grants the Defendant's Motion for Summary Judgment. The parties stipulated at
9 oral arguments that the Defendant TVH was not negligent in its own right. Moreover, the Court finds
10 that Defendant TVH cannot be held liable for the negligence of the other defendants unless the other
11 defendants acted as the employees or agents of the hospital. Idaho has not extended the theory of
12 apparent agency beyond contract cases. The Court is not convinced that the Idaho Supreme Court
13 will do so.

14
15 IT IS SO ORDERED.

16 Dated this 1st day of Sept. 2006.
17
18

19
20 
21 Ronald L. Wilper
22 DISTRICT JUDGE
23
24
25
26

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 1st day of September 2006, I caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER to be served by the method indicated below, and addressed to the following:

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21
22 J. DAVID NAVARRO
23 Clerk of the District Court
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25 By 

26 Deputy Clerk

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wvmc quality managem

05:11 p.m.

11-13-2006

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Attorneys for Defendant West Valley Medical Center

FILED
A.M. 11-20-06 P.M.

NOV 13 2006

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JOSE AGUILAR, individually, as the
Personal Representative of the Estate of
Maria A. Aguilar, deceased, and as the
natural father and guardian of GUADALUPE
MARIA AGUILAR, [REDACTED]
AGUILAR, and [REDACTED] AGUILAR,
minors, and JOSE AGUILAR, JR., heirs of
Maria A. Aguilar, deceased,

Plaintiffs,

vs.

ANDREW CHAI, M.D., STEVEN R.
NEWMAN, M.D., NATHAN COONROD,
M.D., MITCHELL LONG, D.O.,
COLUMBIA WEST VALLEY MEDICAL
CENTER, and Idaho corporation, MERCY
MEDICAL CENTER, an Idaho corporation,
and PRIMARY HEALTH CARE CENTER,
an Idaho corporation, JOHN and JANE
DOES I through X, employees of one or more
of the Defendants,

Defendants.

Case No. CV 05-5781

**AFFIDAVIT OF KATHY D. MOORE
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT**

2084553832

wmc quality managem

05:11pm

11-13-2006

STATE OF IDAHO)
) ss.
County of Canyon)

KATHY D. MOORE, being first duly sworn upon oath, deposes and says:

1. I hold the position of Chief Executive Officer at West Valley Medical Center, defendant in the above-entitled action, and, as such, have personal knowledge of the facts set forth herein.

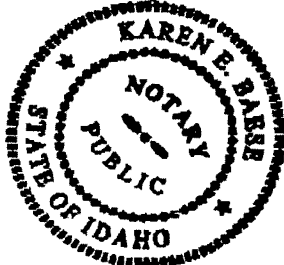
2. I am responsible for reviewing of all the contracts executed on behalf of West Valley Medical Center. At all relevant times, West Valley Medical Center had an independent contract with West Valley Emergency Physicians, P.A. to provide emergency room services at West Valley Medical Center. Dr. Newman was one of the emergency room physicians affiliated with West Valley Emergency Physicians, P.A. who provided emergency room services at West Valley Medical Center. Dr. Newman was not an employee of West Valley Medical Center.

3. Attached hereto as Exhibit "A" is a true and correct copy of the governing contract for emergency room physicians at the time relevant to this action.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Kathy D. Moore
Kathy D. Moore

SUBSCRIBED AND SWORN TO before me this 13 day of November, 2006.



[Signature]
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 3-11-08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2006, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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05:00 p.m.

11-13-2006

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M.D.*

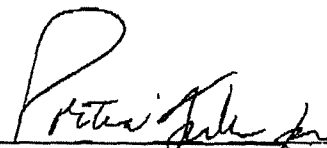
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☐ Telecopy

David R. Lombardi
GIVENS PURSLEY, LLP
601 W. Bannock
P.O. Box 2720
Boise, Idaho 83701
*Attorneys for Defendant Mercy Medical
Center*

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James B. Lynch
Katherine M. Lynch
LYNCH & ASSOCIATES
1412 W. Idaho St. Ste. 200
P.O. Box 739
Boise, Idaho 83701-0739
*Attorneys for Defendant Mitchell Long,
D.O.*

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☒ Hand Delivered
☐ Overnight Mail
☐ Telecopy



Raymond D. Powers

EXHIBIT A

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COPY

CERTIFICATE
PROFESSIONAL SERVICES AGREEMENT
 CO-526 Rev 6/97 (RC# 1005842)

Regarding the Professional Services Agreement between West Valley Medical Center
 ("Facility") and West Valley Emergency Physicians, P.A. ("Contractor"), dated January 01, 2001, 19__

The Professional Services Agreement is comprised of (check all that apply):

- ☒ Professional Services Agreement CO-525
☐ Medical Director - Open Staff Addendum CO-527
☐ Staff Provider Addendum CO-530
☒ Exclusive Provider Addendum CO-784
☐ Separate Billing Addendum CO-785
☐ Facility Billing Addendum CO-786
☐ Facility Billing - Flat Fee for Administrative Services Addendum CO-788
☐ Separate Billing - Flat Fee for Administrative Services Addendum CO-789
☐ Flat Fee for Administrative Services Only CO-790
☒ Other Flat Fee For Professional Services Only

☒ Separate Billing-Flat Fee For Professional Coverage

The undersigned hereby certifies that:

- 1) I have reviewed the Professional Services Agreement described above;
- 2) The compensation arrangement is established at fair market value for the services to be rendered;
- 3) The Professional Services Agreement covers all of the services to be provided by the Contractor (and if the Contractor is or includes a physician, services provided by any immediate member of the physician's family);
- 4) There are no agreements or understandings, whether written or oral, that condition the compensation on the volume or value of any referrals or other business generated between the parties; and
- 5) I will verify that the required services are rendered prior to payment.

Mark R. Oden
 Facility Chief Executive Officer

31201

Facility ID No.

3-1-01

Date

The undersigned Senior Vice President of the owner of the Facility hereby certifies that:

- 1) I have reviewed the Professional Services Agreement described above and hereby approve the terms thereof.
- 2) Based upon the above certification of the Facility Chief Executive Officer, as well as any personal knowledge I may have of the Facility's market, to the best of my information and belief, the compensation arrangement is established at fair market value for the services to be rendered.

Erin

Senior Vice President

Date

The Professional Services Agreement and all addenda are hereby approved as to form:

Alvin M. Brown
 Legal Counsel

3/1/01
 Date

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PROFESSIONAL SERVICES AGREEMENT

CO-525 Rev 6/97 (RC# 1005841)

Regarding the Service of: Emergency Medicine (herein called the "Service")

THIS PROFESSIONAL SERVICES AGREEMENT is entered into by and between West Valley Medical Center, Inc.
d/b/a West Valley Medical Center ("Facility") and West Valley Emergency
Physicians, P.A. ("Contractor").

BACKGROUND

Facility operates a health care facility known as West Valley Medical Center, located in the city of Caldwell, State of Idaho. Facility desires to retain Contractor to provide professional services, and Contractor desires to provide those services all upon the terms and conditions stated below. This Agreement is entered into for the purpose of defining the parties' respective rights and responsibilities.

NOW, THEREFORE, in consideration of the mutual agreements set out below, the parties agree as follows:

Section 1 - Contractor's General Obligations**1.1 Organizational Status.** Contractor represents and warrants that it is either (Check One):

1.1.1 ☐ An individual health care provider duly licensed, certified, accredited or otherwise duly authorized to practice (in the specialty of: _____, if applicable) in the State of _____; or

1.1.2 ☒ A partnership, professional service corporation or association duly organized and validly existing under the laws of the State of Idaho, and authorized to engage in the profession of Emergency Medicine in the State of Idaho; or

1.1.3 ☐ Other: _____

1.2 Contractor's Representatives.

1.2.1 As used in the Agreement, the term "Contractor's Representatives" shall mean all of Contractor's employees, shareholders, partners, subcontractors, and agents providing services under this Agreement. If Subsection 1.1.1 is checked or Contractor is otherwise an individual solely providing services hereunder, then the terms "Contractor" and "Contractor's Representatives" shall be merged and all references to "Contractor's Representatives" shall refer to the individual named above as "Contractor."

1.2.2 ☐ If this box is checked, this Agreement is entered into for the purpose of securing the personal services of one or more individuals, namely: _____

It is agreed that the continued service of said individual(s) under this Agreement is a material obligation of Contractor. No substitutes for said individual(s) may be employed under this Agreement without the prior consent of Facility. Any discontinuation of service by any of said individual(s), or any attempted substitution for any of said individual(s) without Facility's consent, shall be deemed a material breach of Contractor's obligations, entitling Facility to terminate this Agreement immediately.

1.2.3 The following indicate qualifications that must be satisfied by each of Contractor's Representatives as a condition of providing services under this Agreement:

1.2.3.1 Must be accepted by the Facility's Chief Executive Officer; said acceptance may be withdrawn immediately by the Facility's Chief Executive Officer in his or her reasonable discretion at any time with written notice to Contractor.

1.2.3.2 Shall at all times keep and maintain a valid license to engage in the practice of Emergency medicine Idaho in the State of Idaho and Medical Staff membership and/or privileges as may be required under the Bylaws of Facility for Contractor's Representatives to provide the services contemplated by this Agreement.

1.2.3.3 ☐ If this box is checked, shall be certified by the AMA/AOA recognized Board in the specialty of _____ Emergency Medicine; Family Practice; Internal Med. (or eligible for certification by such Board by virtue of having successfully completed all educational and residency requirements required to sit for the Board examinations).

1.2.3.4 Other: Facility CEO approval if not eligible in 1.2.3.3

1.3 Contractor shall provide those services described by reference to Addendum 1 attached hereto and incorporated herein by reference.

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1.4 Subject to the terms of Section 1.2.2, Contractor shall provide, at Contractor's sole cost and expense, a substitute for any Contractor's Representative who is unable to provide services required under this Agreement. As a condition of providing services under this Agreement, any such substitute shall first be approved by Facility's Chief Executive Officer and shall otherwise satisfy all qualification requirements applicable to the Contractor's Representative, including, but not limited to, being covered under Contractor's insurance or submitting separate insurance issued by a company under such terms and limitations as Facility shall reasonably approve.

1.5 Contractor shall prepare such administrative and business records and reports related to the Service in such format and upon such intervals as Facility shall reasonably require.

1.6 Contractor shall submit complete and accurate time records documenting all time spent in providing services pursuant to this Agreement. Such time records shall be submitted in intervals and on such forms as Facility may reasonably require.

1.7 Contractor and Contractor's Representatives shall furnish any and all information, records and other documents related to Contractor's service hereunder which Facility may reasonably request in furtherance of its quality assurance, utilization review, risk management, and any other plans and/or programs adopted by Facility to assess and improve the quality and efficiency of Facility's services. As reasonably requested, Contractor and Contractor's Representatives shall participate in one or more of such plans and/or programs.

1.8 Contractor shall assist Facility in obtaining and maintaining any and all licenses, permits and other authorization, plus achieving accreditation standards, which are dependent upon, or applicable to, in whole or in part, Contractor's services under this Agreement.

1.9 Contractor shall inform Facility of any other arrangements which may present a conflict of interest or materially interfere in Contractor's performance of its duties under this Agreement. In the event Contractor pursues conduct which does, in fact, constitute a conflict of interest or which materially interferes with (or is reasonably anticipated to interfere with) Contractor's performance under this Agreement, Facility may exercise its rights and privileges under Section 3.4 below.

1.10 Contractor agrees not to use, or permit any of Contractor's Representatives to use, any part of the Facility for any purpose other than the performance of services under this Agreement. Without limiting the generality of the foregoing, Contractor agrees that no part of the premises of Facility shall be used at any time as an office for private practice and delivery of care for non-Facility patients. This provision shall not, however, be construed as prohibiting Contractor from maintaining an office for private practice at any professional building owned by Facility or any of its affiliates.

1.11 Neither Contractor, nor any Contractor's Representative, shall have the right or authority to enter into any contract in the name of Facility or otherwise bind Facility in any way without the express written consent of Facility.

1.12 Contractor shall perform all services under this Agreement in accordance with any and all regulatory and accreditation standards applicable to Facility and the Service, including, without limitation, those requirements imposed by the Joint Commission on Accreditation of Healthcare Organizations, the Medicare/Medicaid conditions of participation and any amendments thereto.

1.13 Contractor and Contractor's Representatives shall comply with the bylaws, rules and regulations, policies and directives of Facility and its medical staff.

1.14 As and to the extent required by law, upon the written request of the Secretary of Health and Human Services, the Comptroller General or any of their duly authorized representatives, Contractor shall make available those contracts, books, documents and records necessary to verify the nature and extent of the costs of providing services under this Agreement. Such inspection shall be available for up to four (4) years after the rendering of such services. If Contractor carries out any of the duties of this Agreement through a subcontract with a value of \$10,000.00 or more over a twelve (12) month period with a related individual or organization, Contractor agrees to include this requirement in any such subcontract. This section is included pursuant to and is governed by the requirements of 42 U.S.C. Section 1395x(v)(1) and the regulations thereto. No attorney-client, accountant-client, or other legal privilege will be deemed to have been waived by Facility, Contractor or any Contractor's Representative by virtue of this Agreement.

Section 2 - Change of Circumstances

2.1 In the event (i) Medicare, Medicaid, any third party payor or any federal, state or local legislative or regulatory authority adopts any law, rule, regulation, policy, procedure or interpretation thereof which establishes a material change in the method or amount of reimbursement or payment for services under this Agreement, or if (ii) any or all such payors/authorities impose requirements which require a material change in the manner of either party's operations under this Agreement and/or the costs related thereto, then, upon the request of either party materially affected by any such change in circumstances, the parties shall enter into good faith negotiations for the

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purpose of establishing such amendments or modifications as may be appropriate in order to accommodate the new requirements and change of circumstances while preserving the original intent of this Agreement to the greatest extent possible. If, after thirty (30) days of such negotiations, the parties are unable to reach an agreement as to how or whether this Agreement shall continue, then either party may terminate this Agreement upon thirty (30) days' prior written notice.

Section 3 - Term and Termination

3.1 This Agreement shall be effective as of the 1st day of January 2001, 19____ (the "Effective Date") even though it may be finally executed and delivered on a subsequent date. Unless sooner terminated, this Agreement shall expire and be of no further force and effect as of the end of business on the 31st day of December 2004, 19____.

3.2 Either party may terminate this Agreement, without cause, by providing not less than sixty (60) days' prior written notice stating the intended date of termination, which shall occur not sooner than the first annual anniversary of the Effective Date.

3.3 Upon request by Facility, Contractor shall remove from service under this Agreement any Contractor's Representative who (1) is convicted of a crime other than a minor traffic violation, (2) has a guardian or trustee of its person or estate appointed by a court of competent jurisdiction, (3) becomes disabled so as to be unable to perform the duties required by this Agreement, (4) fails to maintain professional liability insurance required by this Agreement, (5) shall have its license(s) and/or privileges required to perform the services contemplated by this Agreement either suspended, revoked or otherwise limited, or (6) fails to comply with any of the terms and conditions of this Agreement after being given notice of that failure and a reasonable opportunity to comply. In addition to removing any such Contractor's Representative, Contractor shall obtain, at its cost and expense, a substitute for the removed Contractor's Representative or otherwise demonstrate its capabilities for continued coverage and service required by this Agreement. A failure of performance by Contractor under this section shall be deemed a material breach of this agreement. If such a breach is precipitated by an occurrence listed in Items 1 through 5 above, Facility may immediately terminate this Agreement. Otherwise, any such breach shall be subject to Section 3.4 below.

3.4 Either party may terminate this Agreement at any time in the event the other party engages in an act or omission constituting a material breach of any term or condition of this Agreement. The party electing to terminate this Agreement shall provide the breaching party with not less than sixty (60) days advance written notice specifying the nature of the breach. The breaching party shall then have forty-five (45) days from the date of the notice in which to remedy the breach and conform its conduct to this Agreement. If such corrective action is not taken within the time specified, this Agreement shall terminate at the end of the sixty (60) day period without further notice or demand.

3.5 Facility may terminate this Agreement immediately upon any of the following events:

3.5.1 As specified in Sections 1.2.2 and 3.3;

3.5.2 Upon Facility's loss of certification as a Medicare provider;

3.5.3 Upon the closure of Facility;

3.5.4 If Section 1.1.1 applies, upon the death or permanent disability of Contractor; or

3.5.5 Upon Contractor's general assignment for the benefit of creditors, Contractor's petition for relief in bankruptcy or under similar laws for the protection of debtors, or upon the initiation of such proceedings against Contractor if the same are not dismissed within forty-five (45) days of service.

3.6 Upon any termination of this Agreement, neither party shall have further rights against, or obligations to, the other party except with respect to any rights or obligations accruing prior to the date and time of termination and any obligations, promises or agreements which expressly extend beyond the termination, including, but not limited to, those set out in Section 4, 5.7, and 5.9.

Section 4 - Insurance and Indemnification

4.1 Contractor shall keep and maintain professional liability insurance coverage for itself and each of Contractor's Representatives with such insurance companies, issued upon such forms and containing such terms and limitations reasonably acceptable to Facility. Additionally, Contractor's insurance coverage shall provide Facility defense for claims arising solely on the basis of vicarious liability or ostensible or apparent agency, for the acts or inaction of Contractor and/or Contractor's Representatives. As a minimum, such insurance shall provide coverage in the amount of One Million Dollars (\$1,000,000) per occurrence, Three Million Dollars (\$3,000,000) in the aggregate. If such insurance is maintained on a claims-made basis, such insurance shall continue throughout the term of this Agreement; and upon the termination of this Agreement, or the expiration or cancellation of the insurance, Contractor shall purchase, or arrange for the purchase of, either (i) an extended reporting endorsement ("Tail Coverage") for the maximum period that may be purchased from its insurer (ii) "Prior Acts" coverage from the new insurer with a retroactive date on or prior to the date Contractor (or Contractor's Representative, as the case may be) began performing services at Facility or (iii) maintain continuous coverage with the same carrier for

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the period of the statute of limitations for personal injury. In the event Contractor is unable to obtain the required insurance for or on behalf of Contractor's Representatives, Contractor shall require Contractor's Representatives to keep and maintain such insurance coverage individually. All such insurance shall be kept and maintained without cost or expense to Facility. In the event neither Contractor nor Contractor's Representatives purchase the required coverage, Facility, in addition to any other rights it may have under the terms of this Agreement or under law, shall be entitled, but not obligated, to purchase such coverage. Facility shall be entitled to immediate reimbursement from Contractor or Contractor's Representative for the cost thereof. Facility may enforce its right of reimbursement through set-off against any sums otherwise payable to Contractor or any Contractor's Representative who failed to maintain the required coverage. Contractor shall provide Facility with a certificate or certificates of insurance certifying the existence of all coverages required hereunder. Contractor and Contractor's Representatives shall request its or their insurance carriers to provide Facility with not less than thirty (30) days prior written notice in the event of a change in the professional liability policies of Contractor or Contractor's Representatives.

4.2 During the term of this Agreement, Facility shall keep and maintain, at its sole cost and expense, professional and general liability coverage for the acts and omissions of Facility, its officers, directors, employees and agents (excluding Contractor and Contractor's Representatives should it or they be deemed to be agents notwithstanding the contrary intent of the parties). All such insurance shall be issued upon such forms and in such amounts that are customary in the hospital industry.

4.3 Each party specifically reserves any common law right of indemnity and/or contribution which either party may have against the other.

4.4 Contractor shall indemnify, defend and hold Facility harmless from and against any and all claims for wages, salaries, benefits, taxes and all other withholdings and charges payable to, or in respect to, Contractor's Representatives for services provided under this Agreement.

Section 5 - Miscellaneous Provisions

5.1 Any notice required or desired to be given in respect to this Agreement shall be deemed to be given upon the earlier of (i) actual delivery to the intended recipient or its agent, or (ii) upon the third business day following deposit in the United States mail, postage prepaid, certified or registered mail, return receipt requested. Any such notice shall be delivered to the respective addresses set out below, or to such other address as a party shall specify in the manner required by this Section 5.1. The respective addresses are:

If to Facility: West Valley Medical Center
1717 Arlington Ave.
Caldwell, ID 83605

With Copy to: Legal Department
PO Box 550
Nashville, TN 37202-0550

If to Contractor: West Valley Emergency Physicians P.A.
9000 W. Duck Lake Dr.
Boise, ID 83714
With a copy to: Robert Aldridge, Chartered

5.2 Entire Agreement. This Agreement contains the entire agreement of the parties hereto and supersedes all prior agreements, contracts and understandings, whether written or otherwise, between the parties relating to the subject matter hereof. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

5.3 Partial Invalidity. In the event any provision of this Agreement is found to be legally invalid or unenforceable for any reason, the remaining provisions of the Agreement shall remain in full force and effect provided the fundamental rights and obligations remain reasonably unaffected.

5.4 Assignment. Because this is a personal service contract, Contractor may not assign any of its rights or obligations hereunder without the prior written consent of Facility. Facility may assign this Agreement to any successor to all, or substantially all, of Facility's operating assets or to any affiliate of Facility. This Agreement shall insure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

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5.5 Independent Contractor. Contractor and all Contractor's Representatives are performing services and duties under this Agreement as independent contractors and not as employees, agents, partners of, or joint ventures with Facility. Facility does retain responsibility for the performance of Contractor and Contractor's Representatives as and to the extent required by law and the accreditation standards applicable to Facility. Such responsibility, however, is limited to establishing the goals and objectives for the Service and requiring services to be rendered in a competent, efficient and satisfactory manner in accordance with applicable standards and legal requirements. Contractor shall be responsible for determining the manner in which services are provided and insuring that services are rendered in a manner consistent with the goals and objectives referenced in this Agreement.

5.6 Regulatory Requirements. The parties expressly agree that nothing contained in this Agreement shall require Contractor or Contractor's Representatives to refer or admit any patients to, or order any goods or services from Facility. Notwithstanding any unanticipated effect of any provision of this Agreement, neither party will knowingly or intentionally conduct himself in such a manner as to violate the prohibition against fraud and abuse in connection with the Medicare and Medicaid programs (42 USC Section 1320a-7b).

5.7 Alternate Dispute Resolution. The parties firmly desire to resolve all disputes arising hereunder without resort to litigation in order to protect their respective business reputations and the confidential nature of certain aspects of their relationship. Accordingly, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator or arbitrators shall be binding and conclusive on the parties, and shall be kept confidential by the parties to the greatest extent possible. No disclosure of the award shall be made by the parties except as required by the law or as necessary or appropriate to effectuate the terms thereof.

5.8 Third Party Beneficiaries. This Agreement is entered into for the sole benefit of Facility and Contractor. Nothing contained herein or in the parties' course of dealings shall be construed as conferring any third party beneficiary status on any person or entity not a party to this Agreement, including, without limitation, any Contractor's Representative.

5.9 Confidentiality. Contractor acknowledges and agrees that this Agreement is confidential. Neither Contractor nor any of Contractor's Representatives shall disclose this Agreement or any terms hereof to any third parties except as may be necessary to obtain advice and counseling from one's attorneys, accountants or financial advisors or as may otherwise be required through legal process.

5.10 Governing Law. This Agreement shall be governed by the laws of the state in which Facility is located.

5.11 Approvals. Neither this Agreement nor any amendment or modification hereto shall be effective or legally binding upon Facility, or any officer, director, employee or agent thereof, unless and until it has been reviewed and approved in writing by a Senior Vice President of Facility's owner and by Facility's Legal Counsel.

5.13 Addenda. The following addenda are attached to and made a part of this Agreement:

| ADDENDUM | TITLE | FORM NUMBER |
|----------|---|-------------|
| 1 | PSA Exclusive Provider | CO-784 |
| 2 | Flat Fee for Professional Services | na |
| 3 | Separate Billing/Flat Fee for Professional Coverage | na |
| 4 | | |

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IN WITNESS WHEREOF, Facility and Contractor have duly executed this Agreement as of the dates set out beneath their respective signatures.

CONTRACTOR:

West Valley Emergency Physicians, P.A.

By: John Winkler 47Title: PresidentDate: March 1, 2001

TIN: _____

FACILITY:

West Valley Medical Center

By: William B. Adams

Facility Chief Executive Officer

Date: 3-1-2001

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PROFESSIONAL SERVICES / EEMENT ADDENDUM
EXCLUSIVE PROVIDER
 CO-784 Rev 6/97 (RC# 1007372)

Addendum 1

This Addendum is attached to, made a part of and executed simultaneously with that certain Professional Services Agreement (CO-525) between the undersigned, dated the 1st of January 2001, ~~1997~~.

Facility concludes that an exclusive relationship in the Service will best facilitate the delivery of efficient, effective and quality patient care. Such a relationship is expected to improve the relationships between the Service, the Medical Staff and other services of the Hospital; afford effective utilization of the Facility's equipment; provide consistent service and quality control; provide prompt availability of professional services; simplify scheduling of patients and physician coverage; enhance the efficient and effective administration of the service - all of which enhance the quality of patient care. In furtherance of these purposes, Facility hereby establishes Contractor as its exclusive provider upon and subject to the following terms:

1. Operation of the Service

A. Contractor shall assume complete responsibility for the professional operation of the Service and shall provide all professional services which Facility requires to be provided through the Service. Any esoteric, unusual or other procedures which cannot reasonably be performed through the Service will be sent to an outside provider selected by Facility.

B. ~~Contractor shall provide, without charge, those services within its capabilities which are necessary to complete annual physicals for Facility's employees.~~ *WJ*

C. Contractor's Representatives shall prepare timely, complete and accurate medical records in accordance with the policies and procedures of Facility and all professional standards applicable to medical records documentation. All of such records shall be and remain the property of Facility. Contractor and each Contractor's Representative shall have access to those records created by the respective Contractor's Representative as may be necessary for the continuing care of the patient and as otherwise permitted by law.

D. Contractor's Representatives shall participate actively in the affairs of the Medical Staff, including, without limitation, serving on committees and discharging such other obligations as may be requested by the Medical Staff, Governing Body or any duly appointed officer or committee thereof.

E. Contractor agrees that, as requested by Facility, Contractor shall negotiate in good faith for participation by Contractor and any Contractor's Representative designated by Facility in such programs and/or networks in which Facility may participate with health maintenance organizations, preferred provider organizations, other payors, and physician-hospital organizations. Facility agrees to assist Contractor in negotiating terms of participation. However, in the event Contractor fails to agree to terms of participation and, as a result thereof, Facility is threatened with exclusion or expulsion from the network or program or reduced compensation for its services, then Facility may immediately terminate the exclusive provisions of this exhibit and further terminate the Agreement in its entirety pursuant to Section 3.4 of the Agreement.

F. Contractor shall conform to any and all lawful directives issued from time to time by Facility's Chief Executive Officer provided that such directives are consistent with the scope and principles of this Agreement.

G. Other: Coverage for all professional services in the Emergency Department

2. Director of Service

John P. Mullins, M.D. shall serve as Director and William Blahd, M.D. shall serve as the Assistant Director, of the Service and perform the following undertakings:

A. Participate as requested in the administrative functions as necessary to ensure the effective and efficient management of the Service.

B. Participate as requested in Facility's plans and programs adopted to assess and improve the quality and efficiency of Facility's services, including, but not limited to, quality assessment and improvement, utilization review, risk management, and infection control.

C. Provide such supervision, management and oversight to the Service to assure that the professional services rendered meet or exceed accepted standards of care.

D. Participate as requested in the long range planning of Facility, including, but not limited to, equipment selection, budgeting, and staffing.

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E. Provide or arrange for in-service training for Facility's employees and Contractor's Representatives.

F. Cooperate with Facility regarding administrative, operational or personnel problems in the Service and promptly inform Facility and appropriate Medical Staff committees of professional problems in the Service in accordance with Medical Staff Bylaws, Rules and Regulations and Facility policy.

G. Assist Facility in obtaining and maintaining accreditation and all licenses, permits and other authorizations, plus achieving all accreditation standards which are dependent upon, or applicable to, in whole or in part, the manner in which the Service is conducted.

H. Assure the maintenance of accurate, complete and timely patient and other records regarding the Service in order to facilitate the delivery of quality patient care and provide the information required for Facility to obtain payment for its services.

I. Other _____

3. Facilities and Services Provided by Facility

A. Facility shall provide on the Facility premises the space designated by the Facility for the Service, plus any expendable supplies, equipment, and services necessary for the proper operation of the Service. The minimum services to be provided by the Facility are janitor, standard facility telephone, laundry, and utilities.

B. Facility shall employ all non-physician technical and clerical personnel it deems necessary for the proper operation of the Service and to meet standard of care in the community. The Director of the Service shall direct and supervise the technical work and services of such Department personnel. However, Facility retains full administrative control and responsibility for all such Service personnel.

4. Schedule of Services

A. The Service shall be conducted during those days and times which Facility determines to be necessary in order to properly address patient needs and effectively coordinate with other operations. It is agreed that as of the Effective Date, Contractor shall provide services upon the following schedule(s) (check and complete the applicable terms):

- (i) ☒ Full-time in-house service, 24 hours per day, 7 days per week.
 (ii) ☐ Part-time in-house service, _____ hours per day, _____ days per week as provided in Subsection (iii) below, or upon the following days: _____

(iii) ☐ If Facility anticipates a variable need for Contractor's services, or if this subsection is applicable by virtue of its designation in the above subsections, then Facility and Contractor shall meet on a weekly / monthly / quarterly basis (circle one) and establish schedules for Contractor's services during the ensuing period.

(iv) ☐ On-call coverage hours per day, days per week. "On-Call" coverage is defined as Contractor's availability at the Facility within minutes of the attempt to contact Contractor

(v) ☐ Other: _____

5. Exclusive Provider

Provided the Contractor continues to demonstrate its capabilities to fulfill Facility's requirements and is not otherwise in default, Contractor shall be Facility's exclusive provider of the services encompassed by this Agreement, except that any practitioner with appropriate privileges under the Service may continue to use the resources dedicated to the Service for secondary consultations.

6. Effect of Termination

Upon the termination of this Agreement for any reason, Facility may terminate or otherwise qualify or limit the medical staff membership and/or clinical privileges of any or all of Contractor's Representatives. Further, upon any severance of the affiliation between Contractor and a Contractor's Representative, Facility may terminate or otherwise qualify or limit the medical staff membership and/or clinical privileges of such Contractor's Representative. The rights of Facility under this Section shall supersede any contrary terms as may be established in the Medical Staff Bylaws. Contractor shall deliver to Facility a written statement from each Contractor's Representative acknowledging and agreeing to these concurrent termination provisions.

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CONTRACTOR: West Valley Emergency Physicians, P.A.

By: [Signature]

Title: [Signature]

FACILITY: West Valley Medical Center

By: [Signature]

Facility Chief Executive Officer

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PROFESSIONAL SERVICE AGREEMENT ADDENDUM
FLAT FEE FOR PROFESSIONAL SERVICES ONLY**Addendum 2**

This Addendum is attached to, made a part of and executed simultaneously with that certain Professional Services Agreement (CO-525) between the undersigned, dated the 1st day of January, 2001.

A. As sole compensation for the services provided pursuant to this Agreement, Facility shall pay to Contractor the sum of \$ 131.00 per hour, not to exceed 24 hours per day. Such compensation shall be made by the 15th day of the month following that in which such services were rendered. However, such payment shall not be made until Contractor has submitted time records for the period for which payment is due, pursuant to Section 1.6 of this Agreement. In the event of an early termination of this Agreement, such compensation shall be paid for periods in which services were performed and cease, as of the date of termination, or Contractor's breach, if applicable.

B. The compensation agreed to in Paragraph A, above, shall not exceed \$ 97,464 for any month nor \$ 282,960 for the months of January, February and March 2001.

C. Facility shall be responsible for billing patients for services rendered in the Service. All billing statements will include charges for professional services provided by Contractor as set out above, plus Facility's charge for its services and the use of its equipment and supplies. Page four

D. Contractor shall not bill or collect from any patient or payors for services provided by Contractor pursuant to the terms of this Agreement. Contractor's sole compensation for services provided hereunder shall be the monies paid by Facility per paragraph A above.

E. Effective April 1, 2001, Facility will cease billing for Contractor's Professional Service. At that time, Contractor shall assume total responsibility for billing and collections for services provided by Contractor and Contractor's Representatives under this agreement. Also effective April 1, 2001, both Facility and Contractor agree that this Addendum shall terminate and be replaced in its entirety by Addendum 3, Separate Billing- Flat Fee for Professional Services Addendum attached to and made part of the Professional Services Agreement mentioned above.

CONTRACTOR:West Valley Emergency PhysiciansBy: [Signature]Title: President**FACILITY:**

West Valley Medical Center

By: [Signature]

Facility Chief Executive Officer

2084553832

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04-10-2006

13/16

PROFESSIONAL SERVICE AGREEMENT ADDENDUM
Separate Billing - Flat Fee for Professional Coverage**Addendum 3**

This Addendum is attached to, made a part of and executed simultaneously with that certain Professional Services Agreement (CO-525) between the undersigned, dated the 1st day of January 2001. This Addendum shall become effective and shall supercede Addendum 2, Flat Fee for Professional Services on April 1, 2001.

- A. Neither Facility nor Contractor shall charge the other for services provided pursuant to this Agreement.
- B. As compensation for the provision of professional coverage of the Service, Facility shall pay to Contractor the sum of \$5,000.00 per month. Such compensation shall be made by the 15th day of the month following that in which such services were rendered. In the event of an early termination of this Agreement, such compensation shall be paid for periods in which services were performed and cease, as of the date of termination, or Contractor's breach, if applicable.
- C. The compensation agreed to in Paragraph B, above shall not exceed \$5,000.00 for any month nor \$225,000 for the term of the Agreement for the months April 1, 2001 through December 31, 2005.
- D. Facility and Contractor shall make their own independent charges for services to patients, and each shall independently bill for and collect the charges due to them. However, for their mutual assistance in billing and collecting these charges, they agree that: (1) Contractor shall file with Facility's business office a daily report of all professional and hospital services provided to patients by the Service; (2) Facility shall distribute to each patient who is to receive the services of the Service materials provided by Contractor which describe the separate billing arrangement; (3) Facility shall assist Contractor; and (4) Facility shall provide the Contractor or Contractor's Billing Agent, a daily list of admission and discharges for the Service and with any other information necessary for billing by Contractor that Facility may obtain concerning such patient.
- E. Facility and Contractor recognize that certain monies are collected at the time of service for patients of Service. For their mutual assistance in collecting a prorated portion of the professional payments at time of service, Facility agrees to forward to Contractor 48.5% of all cash collections received at time of service by Facility's registration personnel. These collections will apply to only those patients registered as patients of the Service.
- F. Contractor shall prepare a schedule of fees representing Contractor's full compensation for professional services rendered by Contractor to patients. The fee schedule, and any change thereto, must be approved in advance by Facility. Such approval will be granted as long as fees are reasonable and competitive within the community. Approval is assumed granted unless Facility notifies Contractor within 10 days of such notice. Such schedule must, at all times, comply with all applicable laws, rules, regulations, and contractual arrangements with third party payors. The fees set out therein must, at all times, be reasonable and competitive.

CONTRACTOR:

By: [Signature]
Title: President

FACILITY:

West Valley Medical Center
By: [Signature]
Facility Chief Executive Officer

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04-10-2006

14 /16

CERTIFICATE**Amendment to PSA**

Regarding the Amendment ("Amendment") between West Valley Medical Center, Inc., d/b/a West Valley Medical Center ("Hospital") and West Valley Emergency Physicians, P.A. ("Contractor"), dated February 1, 2003.

The undersigned hereby certifies that:

- 1) I have reviewed the Amendment described above;
- 2) The compensation arrangement is established at fair market value for the services to be rendered;
- 3) The Amendment covers all of the services to be provided by the Contractor (and if the Contractor is or includes a physician, services provided by any immediate member of the physician's family);
- 4) There are no agreements or understandings, whether written or oral, that condition the compensation on the volume or value of any referrals or other business generated between the parties; and
- 5) I will verify that the required services are rendered prior to payment.

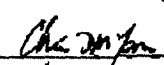

Hospital Chief Executive Officer

The undersigned Senior Vice President of the owner of the Hospital hereby certifies that:

- 1) I have reviewed the Amendment described above; and
- 2) Based upon the above certification of the Hospital Chief Executive Officer, as well as any personal knowledge I may have of the Hospital's market, to the best of my information and belief, the compensation arrangement is established at fair market value for the services to be rendered.


Senior Vice President

The Amendment is hereby approved as to legal form:


Legal Counsel

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08:07:03 a.m. 04-10-2006

15/18

AMENDMENT

This Amendment ("Amendment") is entered into this 1 day of March, 2003, by and between West Valley Medical Center, Inc., d/b/a West Valley Medical Center ("Facility") and West Valley Emergency Physicians, P.A. ("Contractor").

WHEREAS, Facility and Contractor have entered into that certain agreement dated January 1, 2001 which sets forth their respective rights, obligations and duties regarding the provision of emergency medicine services ("Agreement");

WHEREAS, Facility and Contractor acknowledge the significant increases in self pay risk in the Emergency Department; and,

WHEREAS, Hospital and Contractor desire to amend the terms of the Agreement;

NOW, THEREFORE, the Agreement is hereby amended as follows.

1. Addendum 3, Paragraph B to the Agreement is hereby deleted in its entirety and replaced with the following:

B. B. As compensation for the provision of professional coverage of the Service, Facility shall pay Contractor the sum of \$5,000.00 per month for the period from April 1, 2001 through January 31, 2003 and \$9,659 per month for the period from February 1, 2003 through December 31, 2004. Such compensation shall be made by the 15th day of the month following that in which such services were rendered. In the event of an early termination of this Agreement, such compensation shall be paid for periods in which services were performed and cease, as of the date of termination, or Contractor's breach, if applicable.

2. Addendum 3, Paragraph C to the Agreement is hereby deleted in its entirety and replaced with the following:

C. C. The compensation agreed to in Paragraph B, above shall not exceed \$5,000.00 for any month nor shall it exceed \$110,000.00 for the term of April 1, 2001 through January 31, 2003. The compensation agreed to in Paragraph B, above shall not exceed \$9,659 for any month nor shall it exceed \$222,157 for the term of February 1, 2003 through December 31, 2004.

3. Addendum 3, Paragraph E to the Agreement is hereby amended as follows:

E. Commencing on February 1, 2003, Facility will cease forwarding to Contractor 48.5% of all cash collections received at time of service by Facilities' registration personnel. Commencing on February 1, 2003, Contractor's prorated portion of these cash collections for Contractor's professional services will already be a part of the \$9,659 per month fee set out in Paragraph B. As a result, Facility shall be entitled to retain all cash collections received at time of service. Commencing on February 1, 2003, Contractor agrees that the payments under Paragraph B will constitute its total compensation from Facility for those patients registered as patients of the Service.

Except as specifically amended herein, all terms and conditions of the Agreement shall remain in full force and effect.

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04-10-2006

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IN WITNESS WHEREOF, the parties hereto have executed this Amendment effective the day and year written above.

"CONTRACTOR"

By: U. F. KELLEY MD LOVER

"FACILITY"

By: HALL B. ALLEN

Facility CEO

[Signature]
Division President[Signature]
Legal
(Approved A To Form)